

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE: NEW ENGLAND) MDL NO. 13-02419-FDS
COMPOUNDING)
PHARMACY CASES LITIGATION)
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BEFORE: THE HONORABLE F. DENNIS SAYLOR, IV

STATUS CONFERENCE/MOTION HEARING

John Joseph Moakley United States Courthouse
Courtroom No. 2
One Courthouse Way
Boston, MA 02210

May 14, 2013
2:00 p.m.

Valerie A. O'Hara, FCRR, RPR
Official Court Reporter

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PROCEEDINGS

THE CLERK: All rise. Thank you, all.

Please be seated. Court is now in session in the matter of in re: New England Compounding Pharmacy, Incorporated Products Liability Litigation. This is Case Number 13-MD-02419. Counsel, please note your appearances for the record.

8 MS. PARKER: Good morning, your Honor,
9 Kristen Johnson Parker for the plaintiffs' steering
0 committee.

11 | THE COURT: Good afternoon.

12 MR. SOBOL: Good afternoon, your Honor,
13 Tom Sobol for the PSC.

14 MR. CHALOS: Mark Chalos on behalf of the
15 PSC.

16 MR. LIPTON: Marc Lipton on behalf of the
17 PSC.

18 MS. DOUGHERTY: Good afternoon, your Honor,
19 Kim Dougherty on behalf of the PSC.

02:01PM 20 THE COURT: Good afternoon.

21 MR. SEXTON: Good afternoon, your Honor,
22 Scott Sexton on behalf of the Roanoke, Virginia
23 plaintiffs.

THE COURT: Good afternoon.

25 MR. MOLTON: Good afternoon, your Honor,

1 David Molton on behalf of the statutory creditors'
2 committee.

3 THE COURT: Good afternoon.

4 MS. ANDREWS: Good afternoon, your Honor,
5 Anne Andrews creditors' committee, also plaintiffs.

6 THE COURT: Good afternoon.

7 MR. ELLIS: Rick Ellis, various plaintiffs.

8 MR. COREN: Good afternoon, Mike Coren on
9 behalf of the statutory creditors' committee, co-chair.

02:02PM 10 MR. GOTTFRIED: Michael Gottfried for the
11 trustee.

12 MS. EICHEL: Good afternoon, your Honor,
13 Jessica Eichel for the trustee.

14 MR. TUCKER: Good afternoon, your Honor,
15 Scott Tucker for Ameridose.

16 MS. PEIRCE: Michelle Peirce, Barry and
17 Lisa Cadden, your Honor.

18 MR. MORIARTY: Matthew Moriarty for
19 Ameridose. Good afternoon, your Honor.

02:02PM 20 MS. NADEL: Good afternoon, your Honor,
21 Heidi Nadel for Doug and Carla Conigliaro.

22 MR. RABINOVITZ: Dan Rabinovitz on behalf of
23 Medical Sales Management, Inc. Good afternoon, your
24 Honor.

25 THE COURT: Good afternoon.

1 MR. TRANEN: Daniel Tranen for NECC.

2 MR. FERN: Good afternoon, Judge,

3 Frederick Fern for NECC.

4 MR. CUNHA: Good afternoon, your Honor,

5 Zachary Cunha for nonparty, United States of America.

6 MR. CIPORKIN: Good afternoon, Ryan Ciporkin

7 for Alaunus Pharmaceuticals.

8 MR. THOMAS: Joe Thomas, your Honor, on

9 behalf of GDC.

02:03PM 10 MR. CURLEY: Good afternoon, your Honor,
11 Robert Curley for GDC.

12 THE COURT: All right. Good afternoon, and
13 good afternoon to everyone on the telephone. We have,
14 as I see it, at least three things of some significance,
15 one of great significance that I want to talk about
16 today. The principal issue is the trustees' motion to
17 transfer and the various related motions for abstention
18 to withdraw the reference to remand and so on.

19 The second issue is the trustees' motion
02:03PM 20 seeking limited relief from the protective order
21 essentially permitting it to cancel Lisa's and whatnot
22 with regard to equipment and property, and the third is
23 the plaintiffs' steering committee's motion to partially
24 lift the discovery protective order to proceed, and we
25 have, of course, other matters, odds and ends and

1 housekeeping matters to address as well.

2 What I propose to do is to try to have an
3 orderly discussion on what I'm going to call for the
4 sake of convenience the trustee's motion to transfer. I
5 have, I think, read everything. I have to say given how
6 complicated the docket is, I have something less than
7 100 percent confidence I've read everything, but I think
8 I've read everything, including Judge Wilson's opinion.

9 I was distracted last night by what turned
02:04PM 10 out to be a terrific hockey game. Roanoke and such
11 parts, you're really missing out, I have to say, just a
12 great game, and I found it more interesting than the
13 bankruptcy code, but I do want to have an orderly
14 discussion of that, if I can.

15 To cut to the chase, I'm not prepared to
16 rule from the bench because I need to think about this
17 some more, although I think I do need to rule with some
18 alacrity. There are, I think, four attorneys who want
19 to be heard by phone. What I want to do is to have a
02:05PM 20 discussion first in open court and then permit a brief
21 opportunity for supplemental argument by phone, which,
22 again, I hope none of this is repetitive.

23 I'm not quite sure how to structure this,
24 but I think what I would propose is that we just jump
25 into this, and I should probably hear from counsel for

1 the trustee first, but let me first check with lead
2 counsel and see if there's something else that we ought
3 to do first.

4 Ms. Parker, Mr. Sobol.

5 MS. PARKER: That's fine with us, your
6 Honor, thank you.

7 MS. EICHEL: May I argue the motion?

8 THE COURT: Yes. Please argue somewhere
9 where there's a microphone so everyone can hear you.

02:06PM 10 MR. FERN: Judge, if I may, I'd like to
11 introduce Jessica Eichel. She's an associate in my
12 office. She'll be arguing the motion on behalf of the
13 trustee.

14 THE COURT: Are you now representing the
15 trustee? It's not clear to me, Mr. Fern.

16 MR. FERN: Judge, there's a motion pending
17 before Judge Boroff for a special appointment. That has
18 not yet been adjudicated, so I'm working under full
19 authority of the trustee though.

02:06PM 20 THE COURT: All right, go ahead.

21 MS. EICHEL: Good afternoon, your Honor, my
22 name is Jessica Eichel. I'm an attorney at Harris,
23 Beach, proposed counsel for the trustee.

24 The trustee moved to transfer to this
25 district all actions relating to injuries arising from

1 the alleged contamination of the injectable steroid.
2 This is directly on point with this Court's mandate to
3 coordinate the entirety of this litigation and ensure
4 compensation for all plaintiffs in an equitable manner,
5 and in order to do so, we need all cases before this
6 Court.

7 The bulk of the motion is unopposed. No one
8 disputes that this Court has jurisdiction over cases
9 naming the debtor and all affiliated entities and
02:07PM 10 individuals.

11 Where the dispute lies, in what is called by
12 the plaintiffs' steering committee a narrow subset of
13 cases, those that do not name the debtor or its
14 affiliates, but we would submit, your Honor, that this
15 purportedly narrow subset of cases has the potential to
16 unravel much of what the Court and all of the parties
17 hope to accomplish and what the bankruptcy code was
18 designed for, the efficient and equitable administration
19 of the estate.

02:08PM 20 At the forefront of the argument against
21 transfer are the Roanoke, Virginia plaintiffs
22 represented by the Gentry, Locke firm. As you mentioned
23 earlier, this past Friday, a Judge in the Western
24 District of Virginia remanded several of these cases to
25 state court. The trustee stands firm that these and all

1 cases should be transferred because they are related to
2 the bankruptcy case.

3 Notably, Judge Wilson did not come to a
4 decision on "related to" jurisdiction. He assumed that
5 it existed for the sake of his analysis. Frankly, the
6 policy considerations that are before this Court are
7 well beyond the jurisdictional considerations that were
8 before Judge Wilson when he issued his decision, whose
9 primary rationale for remand was that the removals were
02:09PM 10 untimely.

11 Indeed, your Honor has a mandate and
12 authority that far exceeds any other court to coordinate
13 all litigation related to the outbreak as the JPML
14 intended with the arsenal of tools provided by
15 bankruptcy code.

16 If I may, I'd like to talk about "related
17 to" jurisdiction.

18 THE COURT: All right. Let me, at the risk
19 of stating the obvious, I can't do something just
02:09PM 20 because it's practical or efficient or it makes sense, I
21 have to have jurisdiction, I have to follow these
22 statutes which fit together somewhat less than
23 perfectly, and there are other considerations as well,
24 including economy and respect for state court systems
25 and other considerations, which may be trumped at the

1 end of the day, but I certainly am not free to act with
2 sweeping dictatorial powers, I need to follow the law
3 such as I can figure it out, but go ahead.

4 MS. EICHEL: I would agree, and it's our
5 position that under 1334(b), this Court does have
6 "related to" jurisdiction over all cases that are
7 related to the bankruptcy.

8 THE COURT: Let me interject the following,
9 and I'm sure I'm getting ahead of your argument, but for
02:10PM 10 the sake of simplicity, let me think of this in terms of
11 a state court action against parties not related to
12 NECC, let's call it a pain clinic, a physician, and the
13 principal concern, as I understand it, not the only
14 concern, but the principal concern are contribution or
15 indemnity claims against NECC, right?

16 MS. EICHEL: Right.

17 THE COURT: And the problem, or one of the
18 many problems, is the contribution and indemnity claims
19 come in different flavors, contractual, statutory,
02:11PM 20 common law and may be asserted at different times. You
21 can assert them as soon as you're sued, or you can wait
22 until there's a judgment against you and assert it.

23 But what is the "parade of horribles"?
24 Suppose I did let things go forward in Roanoke City
25 Court, let's say that there was a large judgment in the

1 future against pain clinic or physician or both and that
2 they then sought indemnity or contribution from NECC,
3 what is the horrible consequence that follows from that?
4 Suppose that is replicated, you know, in other courts,
5 other state courts around the country?

6 In other words, presumably as long as it's
7 still in bankruptcy, those are claims that have to be
8 made in the bankruptcy court, right, there's an
9 automatic stay, you can't just file a third-party
10 complaint I assume at this point against NECC.

02:11PM 11 MS. EICHEL: Right.

12 THE COURT: Wouldn't the bankruptcy court
13 have jurisdiction over those contribution or indemnity
14 claims?

15 MS. EICHEL: Well, one moment.

16 THE COURT: Or to put it in another way, and
17 bluntly -- I'm sure I'm going to say things that reveal
18 my ignorance -- but let's say you had a \$50 million
19 judgment against a pain clinic in Roanoke and they make
20 a claim for indemnity, and the bankruptcy court says
21 that's very interesting, you know, we're paying out
22 \$1500 on each indemnity claim, that's all we have, or
23 you get zero because you're too late, you filed past our
24 deadline.

25 MS. EICHEL: Right.

1 THE COURT: I just want to make sure I
2 understand what the consequences are if I don't do what
3 you're asking me to do.

4 MS. EICHEL: Well, of course, the primary
5 concern here are remuneration for the plaintiffs, but
6 what's going to happen is that by its very nature
7 personal injury claims are -- you can't predict the
8 outcome of what's going to happen, and it's very likely
9 that these plaintiffs will get large verdicts against
02:13PM 10 their healthcare providers and other nondebtors in their
11 state court cases.

12 THE COURT: All right.

13 MS. EICHEL: While that's going on, while
14 that litigation is going on, these defendants are going
15 to be litigating the same issues in many forums all over
16 the country.

17 THE COURT: There's a discovery issue which
18 I want to get to, in other words --

19 MS. EICHEL: Sure.

02:13PM 20 THE COURT: -- having multiple competing
21 demands for discovery, which is important, but I want to
22 focus now on contribution and indemnity. In other
23 words, wouldn't the pain clinic have a strong incentive
24 to try to bring a third-party claim of some sort in the
25 bankruptcy court or wherever you bring it now, in other

1 words, not to wait, whatever hope they have of
2 contribution indemnity, they need to assert that claim
3 now?

4 MS. EICHEL: We expect that they will, for
5 example, InSight Health Corp. has already asserted in
6 many different avenues that it intends to bring a claim
7 against the estate, but where a plaintiff -- what we
8 have to be concerned with, your Honor, is that these
9 defendants are going to get out in front of the
02:14PM 10 plaintiffs.

11 We have a limited estate, as we know.
12 There's limited resources, and there are multiple
13 parties already asserting claims or that intend to
14 assert claims. We know of 180 approximately plaintiffs
15 that already have filed claims in the MDL, cases in the
16 MDL, and there are several other claims that we're aware
17 of to date, but then you have these claims for
18 contribution indemnification that are potentially in the
19 millions of dollars, and so what's going to happen is
02:14PM 20 that these defendants are going to come into the estate
21 and make claims against it and try to get around the
22 plaintiffs and interfere with the process, which is to
23 keep these cases coordinated, to keep them together and
24 to fairly and equitably treat all creditors of NECC.

25 THE COURT: All right. But at the end of

1 the day, doesn't the bankruptcy court manage that
2 process? In other words, wouldn't the bankruptcy court,
3 or for this court, depending on how it plays out --

4 MS. EICHEL: Right.

5 THE COURT: -- be in charge of that process
6 at the end of the day? In other words, you could come
7 in with your \$50 million judgment, but you're just
8 another unsecured creditor, aren't you?

9
02:15PM 10 Couldn't the bankruptcy court say that's
11 very interesting, you know, get in line behind everybody
12 else, and, by the way, the injured plaintiffs come
13 first? I'm having trouble sorting this out in my mind
exactly how this would work.

14 MS. EICHEL: I think it's difficult trying
15 to predict what is going to happen. Right now we're
16 still working, and the trustee is still working on
17 creating a plan that's fair to all claimants, and so
18 it's difficult to predict exactly how it's going to
work.

02:16PM 20 What we're most concerned with is that right
now we have 20 or so actions in Virginia that involve
these nondebtor entities. If they have a path, the
plaintiffs have a path to bring state court actions
against those entities, we're going to have cases all
over the country involving those nondebtor healthcare

1 providers.

2 THE COURT: But, again, doesn't it intersect
3 in two ways with this case? Discovery, in other words,
4 we don't want the same people deposed 30 times. If
5 nothing else, to manage the resources of the estate, so
6 there's a discovery issue there, and there's this
7 contribution and indemnity issue.

8 Is there another issue? I think your
9 pleadings referred to the idea that NECC might itself
02:17PM 10 have indemnity claims anyway against some other
11 entities. It's not clear to me whether they would have
12 any against any of these pain clinics or physicians, but
13 is that the whole universe of how it would intersect
14 with this proceeding?

15 In other words, suppose I had a way to
16 manage discovery so we didn't have multiple depositions.

17 MS. EICHEL: Right.

18 THE COURT: Maybe I don't. I don't know,
19 I'm just thinking out loud, and we have the contribution
02:17PM 20 indemnity issue. Is there something else I would need
21 to be concerned about? I mean, at the end of the day,
22 these pain clinics may not have any source for
23 contribution indemnity. They may be out of luck, and it
24 may be unfair to them, but is that my concern?

25 MS. EICHEL: I think every potential

1 creditor is a concern of this Court. While the
2 plaintiffs that we know of are at the foremost concern
3 of the MDL, the bankruptcy estate is going to be created
4 to treat all creditors fairly and equitably, and so
5 we're asking for more by allowing these cases to proceed
6 separately, we're going to have more claims for
7 contribution and indemnification and more entities that
8 are able to assert claims against the estate, which
9 would necessarily deplete it.

02:18PM 10 THE COURT: I guess that's what I'm
11 struggling with. Why would it necessarily deplete it?
12 Do all these claims have to be made pro rata in the
13 bankruptcy court? Does the law require that? In other
14 words, if you have a \$50 million judgment and you're
15 seeking indemnity or contribution, does that mean you
16 have 50 times the rights of a \$1 million creditor? Is
17 that automatic?

18 Could the bankruptcy court say, for example,
19 you know, we have this limited fund, here's what we're
02:19PM 20 going to do, every death case gets this much, this kind
21 of illness gets this much, and whatever is left over,
22 you know, it's going to get split among, you know,
23 whatever creditors remain. I thought they had sweeping
24 powers to manage the estate.

25 MS. EICHEL: Right.

1 THE COURT: And I'm sure I can be wrong on
2 that, I probably am wrong, but it's just not clear to me
3 why this mega judgment against a pain clinic in Virginia
4 necessarily fouls up the bankruptcy plan as opposed to
5 just being a piece of paper that's like any other piece
6 of paper where --

7 MS. EICHEL: Right.

8 THE COURT: -- you know, the bankruptcy
9 court takes it into consideration and in effect says get
02:19PM 10 in line with everyone else.

11 MS. EICHEL: Sure. Well, you know, at this
12 point, the trustee has not yet formulated a plan, and
13 that's obviously the goal, so I think it's really
14 difficult to predict how exactly this is going to work,
15 but if your Honor had control over all of these cases,
16 then the overriding goals of the bankruptcy and
17 maintaining the estate, the resources of the estate so
18 that ultimately there's as much money as possible for
19 the claimants is the best way to avoid letting this
02:20PM 20 really run amuck because we're going to have all of
21 these state court actions and all of these potential
22 claims that are going to be filed against NECC.

23 THE COURT: I want you to get back on track
24 with your argument, but let me ask another question. Is
25 there any way that I could control discovery if I do

1 what the plaintiffs' steering committee suggests, which
2 is to deny these without prejudice and let it play out?
3 In other words, you know, someone in a case in Roanoke
4 wants to take the deposition of somebody at NECC or, you
5 know, demand documents or whatever, do I have the power
6 in any way to control that?

7 MS. EICHEL: I think that suggestion is
8 really concerning because if you don't take jurisdiction
9 over these cases, even if temporarily, we see how it all
02:21PM 10 plays out, it's creating a road map for all these other
11 cases to go forward, and the overriding goal is to
12 centralize. That's what the JPML wanted this Court to
13 do by creating the MDL to only go through these
14 discovery issues one time in one court through one
15 overseer of the entirety of the action.

16 THE COURT: Suppose I took, I swept in
17 everything, as the trustee suggests, could I sever or
18 spin things out? In other words, could I issue some
19 orders to manage the process, for example, let's say I
02:22PM 20 now have jurisdiction over every case everywhere in the
21 country and I set some process for filing contribution
22 indemnity claims, set some procedures for discovery and
23 then spin it back, sever it and spin it back out, would
24 that be a sensible solution? I'm thinking out loud. I
25 have no idea.

1 MS. EICHEL: No, I understand. I think that
2 there's potential for that. It's not something that's
3 been briefed, and I think it's something that we'd have
4 to look into, what the most practical way of doing this
5 is as long as the overriding goal continues to be that
6 the litigation is coordinated and that we're not
7 needlessly conducting discovery in many different for
8 over and over again, so, you know, I can't really speak
9 to what the potential opportunities are for you.

02:23PM 10 I think that you have to exercise
11 jurisdiction over these cases so it's firmly within your
12 hands how these cases go forward and so that we can work
13 with the trustee and all the creditors to effectuate an
14 equitable plan.

15 THE COURT: All right. I think I
16 interrupted you about 15 minutes ago. I'm going to let
17 you get back on track.

18 MS. EICHEL: It's not a problem. I did want
19 to get into a "related to" jurisdiction analysis, and it
02:23PM 20 hits on some of what we've discussed. 1334(b), as I
21 mentioned, gives this Court jurisdiction over all cases
22 that are related to the bankruptcy, and the trustee
23 argues that this Court should not stop a transfer of
24 cases against the debtor, it should extend its
25 jurisdiction to all cases that impact the estate because

1 of the overriding policy to formulate and conform a
2 Chapter 11 plan that treats all claimants equitably.

3 We look at it that the number of
4 contribution claims that will inevitably be filed
5 certainly if the Gentry, Locke plaintiffs are allowed to
6 proceed, it's going to lead to a multitude of other
7 cases filed in state courts against the nondebtor
8 entities. That would render the whole plan futile.

9 We know that the healthcare providers and
02:24PM 10 the other nondebtor entities are planning to file claims
11 for indemnification and contribution. Even if we just
12 look at the InSight Health Corp. defendant, they've
13 taken multiple measures to try to assert those claims
14 against the estate.

15 THE COURT: Am I right that those claims
16 have to be asserted at this point in the bankruptcy
17 court, in other words, because they couldn't file a
18 third-party complaint because of the automatic stay?

19 MS. EICHEL: At this time, what they did was
02:25PM 20 they -- first they demurred. In Virginia, that's a
21 motion to dismiss. They also removed the cases
22 obviously, as you know, under 1452, and then they also
23 attempted to implead the debtor as a necessary and
24 indispensable party.

25 In Virginia, those claims are considered

1 ripe, so they could potentially assert a claim in the
2 bankruptcy, but, again, that's somewhat premature
3 because the claims process and the deadlines haven't yet
4 been set, and those details haven't been worked out.

5 What's important when you're thinking about
6 "related to" jurisdiction is what the Sixth Circuit did
7 in Dow Corning. There they found that the Court had
8 "related to" jurisdiction over the unasserted claims for
9 contribution indemnification because of its impact on
02:26PM 10 the estate. There, the defendants had used the same
11 product that were originating with the debtor, and the
12 Court held that there was a unity of the defendants
13 there that we would argue exists here.

14 The defense of any claims by these
15 nondebtors will have to involve NECC. It all leads back
16 to what NECC did or did not do. They're going to derive
17 from the same facts. In order to prosecute and defend
18 those cases, they'll need discovery from the estate, and
19 what we fear will happen is we're going to have
02:27PM 20 to -- NECC and the estate is not going to be in your
21 control, it's going to be in the control of state court
22 judges around the country.

23 We already know of this coming up in
24 Virginia, but we're aware of other jurisdictions,
25 Tennessee, Alabama, Minnesota, Michigan where this same

1 thing is going to happen, and what's happening now is
2 that the Roanoke plaintiffs are creating somewhat of a
3 road map for these other plaintiffs to follow.

4 And it really will cause the -- what's
5 happening in this courtroom to implode because your
6 control and what the JPML mandate was, which to
7 coordinate these actions, it's going to be impossible to
8 do so. It's unimaginable how that would work.

9 I also, your Honor, want to point out that
02:28PM 10 several of those Roanoke plaintiffs are actually before
11 this Court because they filed actions in the MDL. They
12 filed the actions against NECC, and those cases were
13 transferred to the MDL, and then when NECC filed for
14 bankruptcy, they brought these actions in state court
15 against the nondebtor entities, the healthcare providers
16 and so on.

17 It doesn't seem possible how they can argue
18 how those two actions which derive from the same
19 injuries are not related to one another. They are state
02:29PM 20 court actions that necessarily are going to run into the
21 issues that we're dealing with here.

22 THE COURT: Let me interject again. How
23 would this play out? Let's suppose that we had a plan
24 from the bankruptcy court, it's approved, the matter is
25 closed. Other litigation against other -- would other

1 litigation, again, like the pain clinic, would that be
2 spun out? In other words, let's say three years from
3 now everything is in place but all these actions still
4 exist. Under the MDL, whatever, I'm supposed to spin
5 those cases back to their home jurisdictions if there's
6 anything left to be litigated.

7 If there's a claim against a pain clinic,
8 wouldn't that go back to Roanoke to be tried against the
9 pain clinic? If the pain clinic then had a claim for
02:30PM 10 contribution indemnity, what would happen? Wouldn't it
11 just be out of luck, again, getting back to my
12 hypothetical \$50 million verdict? Wouldn't it just be
13 stuck at that point?

14 MS. EICHEL: First of all, we're not really
15 just dealing with an MDL in the traditional sense,
16 there's also a bankruptcy.

17 THE COURT: Right.

18 MS. EICHEL: And for as long as those other
19 actions are going on and being litigated, the bankruptcy
02:30PM 20 plan can't be finalized and closed.

21 THE COURT: I guess I'm saying those actions
22 are going to exist regardless. I mean, a plaintiff in
23 Roanoke could make the rational decision that I'm more
24 likely to get more money from the pain clinic and its
25 insurers than I'm going to get from this quagmire, and I

1 can't take that claim away from them entirely unless the
2 pain clinic is somehow in bankruptcy in my court, right?

3 MS. EICHEL: Right.

4 THE COURT: I mean, they've got a Seventh
5 Amendment jury trial right and they have the right to
6 pursue that claim, so if they don't give up, they may
7 pursue it eventually. What happens if I take that case,
8 again, we resolve everything at the bankruptcy as to
9 NECC and its affiliates, we now have these claims
02:31PM 10 remaining against pain clinics and physicians and
11 whatnot, I spin those all back out, they go to judgment,
12 what happens to their contribution indemnity claims,
13 they're just out of luck at that point, right, they got
14 what they got out of the bankruptcy estate if there's a
15 fund, and that's it, right?

16 MS. EICHEL: I think that that is a possible
17 scenario, that they would be left without any available
18 remedies, but I think it's important when we do this
19 analysis to think about the broader issues at stake
02:31PM 20 here, which are that these aren't a few health care
21 providers that are going to have these claims or a few
22 plaintiffs that are raising these issues, this is really
23 every single plaintiff in this action, so the bankruptcy
24 plan really can't be formulated without all of those
25 actions being brought here and centralized.

1 I would just say that the claims process,
2 that the claims process basically will crumble because
3 we'll be waiting to see what's happening with these
4 claims for contribution and indemnification, and we
5 won't be able to pay out until we know what is -- who is
6 try to recover from the estate. We won't have all of
7 the claimants before us while these other actions are
8 being litigated.

9 THE COURT: Well, that's, again, what I'm
02:33PM 10 struggling with. In other words, suppose instead this
11 court, the bankruptcy court, said, you know, here we set
12 a deadline, maybe the deadline is in 2015, but there's a
13 deadline. If you have a claim, you have to file it. If
14 it's a claim for contribution indemnity, file it. If
15 you're a pain clinic in Tennessee, you have a pretty
16 strong incentive, I think, to get that claim on file,
17 and like any other bankruptcy estate, you know, we have
18 a deadline, you file your claim, and either you file it
19 or you don't, and if you don't, then the obligation is
02:33PM 20 discharged, right?

21 MS. EICHEL: You know, the outcome of what
22 happens I think is less important than what's happening
23 while this is all going on because while we can talk
24 about the claims against the healthcare providers and
25 the distributors in a vacuum and what those actions will

1 look like, they can't be litigated without considering
2 NECC, which will lead to discovery.

3 THE COURT: Let's talk about that. And I
4 may want post-argument briefing on this. Do I have any
5 way at all to manage that discovery process without
6 taking jurisdiction over those cases? Do I have any
7 authority at all to limit and regulate and ride herd
8 over discovery requests as to NECC and its affiliates
9 and related individuals unless I have jurisdiction over
02:34PM 10 those cases? I don't know the answer to that.

11 MS. EICHEL: I don't think that you do. I
12 don't see how you can control what's happening in a
13 state court action in Virginia or elsewhere. Those
14 judges are going to control those cases, and they're not
15 concerned with the broader mandate that we have here,
16 which is to: 1, litigate all claims that arise from
17 injuries related to the injectable steroid; and, 2, to
18 fairly and equitably to allow these claimants to
19 recover, to create a plan that's fair and equitable that
02:35PM 20 counts for everybody.

21 So, you know, I think that might warrant
22 further briefing, if that's what you ultimately decide,
23 but I would say that at this point it's better for you
24 to take jurisdiction and figure out how we can
25 potentially, if necessary, spin some of these issues off

1 than for you to relinquish jurisdiction, and then it's a
2 free-for-all.

3 THE COURT: Well, I guess that's exactly the
4 issue I'm trying to figure out, and I have some natural
5 caution here to reach out and grab everything. I mean,
6 at the end of the day, I may do that. It may be the
7 best of a lot of bad alternatives, but, again, there are
8 countervailing considerations. I do want to be
9 respectful to state court processes and not to violate
02:36PM 10 any of the relevant statutes.

11 If I took control of the state court cases
12 and issued orders in them and then spun them back out,
13 it's not clear that those orders would continue to be
14 valid or that they couldn't be modified by a state
15 judge, on the other hand, I assume someone from Virginia
16 can't just take a deposition in a Virginia state action
17 in Massachusetts, you need to get process, right, you'd
18 have to go into state court or something. That may be a
19 hook there. Maybe we could work something out that way
02:37PM 20 that all state discovery be coordinated through -- I'm
21 not sure how it would work. I certainly share the
22 concern about multiple discovery requests. I think that
23 is a genuine issue that needs to be addressed somehow.

24 MS. EICHEL: If I may, your Honor.

25 THE COURT: Yes.

1 MS. EICHEL: I think it's also important to
2 think about why these actions were filed in state court,
3 and it seems clear to me that they were trying to fort
4 this Court's jurisdiction, to stay out of the
5 bankruptcy, but the bankruptcy is there to protect all
6 creditors of the estate, and it's really just an end run
7 around this Court's jurisdiction and getting out in
8 front of all these other plaintiffs.

9 02:38PM If you're going to question whether you have
10 jurisdiction or whether state court cases, state courts
11 can deal with these issues independently, I would say
12 that the only way you can effectively manage it is to
13 retain jurisdiction over all of these actions, which is
14 consistent with what the JPML gave you the mandate to
15 do, and it's consistent with the arsenal of tools that
16 the bankruptcy code provides.

17 THE COURT: So getting back to you say I
18 have an obligation or the bankruptcy court has the
19 obligation to protect the creditors. In this case, you
02:38PM 20 would include the pain clinics or the physicians as
21 creditors in that analysis, is that the idea? In other
22 words, if they are contribution and indemnity creditors,
23 they're creditors, nonetheless? Does it make a
24 difference whether they are potential claimants as
25 opposed to actual claimants? Does that make any

1 difference in this context?

2 MS. EICHEL: They're potential, but we know
3 that they exist and that they're going to be asserted,
4 so there's really no difference between those.

5 Do we -- I think you're asking if we really
6 are concerned with whether at the end of the day those
7 pain clinics pay out to these plaintiffs and are not
8 able to recover? You know what, and it's a good
9 question, I just -- I don't think that we can really
02:39PM 10 begin to figure it out because it's -- there's just too
11 much at stake. There's too many cases, too many
12 plaintiffs that are going to bring these claims.
13 There's too many other parties that are going to be
14 subject to other court's jurisdiction, and they're going
15 to be out of pocket potentially rightfully, potentially
16 they do have or should have an opportunity to recover as
17 well.

18 I think in answer to your question, the
19 foremost concern of I would think everybody here are the
02:40PM 20 injured parties.

21 THE COURT: I agree with that. All right.
22 Go on. At the end of the day, you may be right. I may
23 agree with you. I'm struggling with that, obviously.
24 Maybe this means I don't have the right Federal Judge
25 attitude, that I'm pausing before taking over every

1 single problem, state and federal, in the United States.
2 Maybe the full weight of the robe hasn't fallen on my
3 shoulders yet, but I do think I need to pause and think
4 this through.

5 There are lots of countervailing
6 considerations, and I want to make sure I'm not doing
7 more harm than good if I go down this path, that this is
8 sensible, and I'm being fair to everyone. Obviously
9 injured parties are an important part of it, but they're
02:41PM 10 not the only part of it.

11 MS. EICHEL: Well, you know, I'll leave you
12 then with a thought about centralization.

13 Centralization of this litigation is critical for the
14 efficient and expeditious resolution of this case, and
15 the trustee's making every effort to efficiently and
16 fairly compensate the creditors, and from that
17 perspective, the only chance at any kind of global
18 resolution is to use the powers afforded to you by
19 Congress, by the JPML and to transfer all these cases to
02:42PM 20 this court.

21 THE COURT: All right. Thank you. I think
22 what I'd like to do next is hear from the steering
23 committee and then maybe from -- Mr. Sexton, are you
24 going to take the lead on the Roanoke piece of this? Is
25 that the plan?

1 MR. SEXTON: Yes, your Honor.

2 MR. MOLTON: Your Honor, David Molton for
3 the creditors' committee.

4 THE COURT: Yes.

5 MR. MOLTON: I was just thinking because we
6 joined in the motion that we'd maybe go next, and maybe
7 I could answer some of your questions.

8 THE COURT: Ms. Parker, do you have a
9 problem with that?

02:42PM 10 MS. PARKER: No, your Honor.

11 THE COURT: Go ahead.

12 MR. MOLTON: Judge, David Molton for the
13 statutory creditors' committee, and I'm glad I brought
14 my bankruptcy code with me. In any event --

15 THE COURT: Are you going to read from it?

16 MR. MOLTON: No, Judge.

17 THE COURT: I have a tape of the hockey
18 game.

19 MR. MOLTON: I was glad I had it because a
02:43PM 20 number of your questions caused me to open the book. I
21 think I can, first of all, answer a few of your
22 questions by reference to the bankruptcy and the
23 bankruptcy code. First of all, the creditors'
24 committee, as you know, is a statutory committee
25 invested with power to represent all the creditors, and

1 that includes at this point not only the plaintiffs in
2 this MDL but also all the infected folks, 700 plus,
3 possibly the 13,000 who received the tainted MPA
4 steroid, and one of the things we don't want to do, and
5 the trustee joins me on this, is create new creditors
6 for us to represent, which would be indemnity and
7 contribution creditors, so we're supporting the
8 trustee's motion, and that motion has to be read in
9 context, your Honor, with the trustee's stated goal,
02:44PM 10 which he's told you a number of times, which is what he
11 wants to do is bring everybody here together in front of
12 your Honor and devise a plan using the bankruptcy tools
13 to get all parties, all potentially liable parties,
14 whether it be through a mediation process, through
15 discussions, whatever, to contribute to a pot in the
16 bankruptcy, for which those people, including the pain
17 clinics in the states, would release their indemnity
18 claims and contribution claims against the estate in
19 return for plan releases.

02:44PM 20 That's why they are incented to come here
21 and deal with the trustee in accordance with his global
22 plan, and he believes and we believe that getting
23 everybody here is a significant step in that direction.

24 I know your Honor read all the papers. I
25 know the trustee cited many times the Twin Labs case and

1 the Metabolife case. That's what happened there.

2 THE COURT: We do have cases pointing in the
3 other direction, the Third Circuit.

4 MR. MOLTON: And I'm going to get to that,
5 I'm just going to add some things. But the "parade of
6 horribles," your Honor, that you asked about is simply
7 this: Is there plaintiffs in jurisdictions or with
8 defendants, all of who have claims against the debtor,
9 they have asserted or may have potential claims against
02:45PM 10 various non-debtors, some of them may have a lot of
11 money, some of them may not have a lot of money. Some
12 of them may have big policies, others of them may have
13 no policies.

14 In any event, what I think my friend from
15 Harris, Beach was trying to say is that if there is a
16 major judgment against one of these state third parties,
17 that party then has a liquidated claim for indemnity and
18 contribution, forget about whether they'll be an
19 objection, whether it should be allowed or not, that's
02:46PM 20 separate litigation, but that claim is filed in the
21 bankruptcy, and they rank *pari passu* with the victims.
22 They're all unsecured creditors, there's no priority,
23 and I think that answers one of your questions, your
24 Honor.

25 THE COURT: And it has to be that way?

1 MR. MOLTON: It has to be that way pursuant
2 to the code, and I'd refer you to 502 of the code,
3 Section 502 of the code.

4 Now, the bottom line is that any time from
5 here, there's 362, Section 362 of the bankruptcy stay,
6 so none of these third parties can crossclaim for
7 indemnification unless they get a vacator of that stay
8 by the bankruptcy judge, or they can't file an
9 independent suit, but what they can do, even now, and
02:46PM 10 they will do the bar date, and there's going to be a bar
11 date at some period of time in the bankruptcy, they will
12 have to file at that point a contingent indemnification
13 and contribution claim in the bankruptcy. That is a
14 valid claim.

15 Section 101 of the bankruptcy code defines
16 claim to include "all contingent claims." That claim
17 then ranks on the same level with the contingent claims
18 of the victims, and that's what the trustee is trying to
19 avoid, and you're right, your Honor, at the end of the
02:47PM 20 day, if there's a plan confirmed and those claims are
21 still contingent, they're disallowed, right, so that was
22 one of your questions, what happens at the end of the
23 day when if these claims aren't -- and remind me about
24 attorneys' fees because that's a different issue --

25 THE COURT: I'm sure none of us care about

1 attorneys' fees.

2 MR. MOLTON: -- and then liability. I'm
3 talking about defense costs, but the code provides for
4 that, and, you know what, these third parties who have
5 contingent indemnification or contribution claims in the
6 bankruptcy aided by capable bankruptcy counsel aren't
7 going to sit and wait until a plan is confirmed.

8 First of all, they're going to be part of
9 that plan process, they're going to scream and yell and
02:48PM 10 fight to assert themselves, and there's a provision in
11 the code called 502(c), yes, 502(c) of the bankruptcy
12 code.

13 What that code does is says they can make a
14 motion, the trustee can make a motion, the creditors'
15 committee can make a motion to estimate those claims for
16 the purpose of the plan, and what that will do, they'll
17 be a lot of litigation over that, they'll be a mini
18 trial, mini trial, maybe a maxi trial over that, all of
19 which is going to deplete the estate.

02:48PM 20 But the bottom line is these people aren't
21 helpless, these people who hold these claims aren't
22 helpless to wait till the end of the day, and if they
23 haven't liquidated their claim, they're out, no, they
24 get a right to try and have those claims estimated in
25 the bankruptcy, and that's going to be more costs, so

1 what we're trying to do, the committee with the trustee
2 and the PSC, looking at a vision, and there may be
3 differences of approach at times, but what we'd like to
4 do is eliminate as much as possible giving me more
5 people to represent.

6 Okay. So the way to do that, and the way
7 it's been done all across the nation, as your Honor has
8 read in the cases, is by having a consolidated
9 proceeding supervised in coordination with the
02:49PM 10 bankruptcy court, and we believe that the "parade of
11 horribles" is that that poor plaintiff in Michigan, in
12 Virginia, even Virginia, my friend, Mr. Sexton, is going
13 to disagree with me, who doesn't have a big pocket is
14 going to have to then compete with the big pockets that
15 other more fortunate victims were able to collect
16 against, and that pot in the bankruptcy, if this is let
17 to go unbridled is just going to be -- it's going to be
18 a finite pot.

19 Hopefully we're going to enlarge it for the
02:50PM 20 benefit of everybody, but you're going to have that poor
21 plaintiff who doesn't have the wealthy, big pocket
22 defendants is going to have his or her victims' claim
23 diminish *pari passu* by these big judgments or these
24 estimated claims, and in that way, if I can add to my
25 friend from Harris, Beach, that's the inequity that the

1 trustee is trying to prevent, that's the inequity is
2 that we're trying to treat all these plaintiffs alike
3 and get them paid out *pari passu* for the benefit of --
4 you know, to pay them, compensate for their injuries and
5 keep out competing claims by people who we don't need
6 competing against them.

7 Your consolidating these claims, your Honor,
8 and taking jurisdiction over them -- and I'm going to
9 get to that in a minute -- would significantly
02:50PM 10 facilitate that process.

11 Your Honor also asked about discovery.
12 Assuming I want to retain jurisdiction, and, you know, I
13 want to supervise discovery, well, I think the trustee
14 in last night's papers gave you one way of doing that,
15 the All Writs Act, and I know that that was raised last
16 night.

17 Also, your Honor, in bankruptcy courts all
18 over the country, to the extent it becomes an issue,
19 there may also be other remedies to deal with that
02:51PM 20 through the injunction of Section 105 of the bankruptcy
21 code, but that's not here and now.

22 THE COURT: I hope you appreciate my
23 hesitation in either, you know, acting under the All
24 Writs Act or enjoining a state court proceeding. I
25 mean, we're at the outer limits of judicial authority

1 under any circumstances.

2 MR. MOLTON: Judge, I agree with you, and,
3 you know what, I don't think you need to do that. I
4 think 157(b)(5) gives you the authority to bring these
5 cases here. That brings me -- and I'm going to finish
6 up because I know there's a lot of other people here,
7 and I hope I touched -- was able to answer, to help my
8 friends, to add to my friend's answers to your Honor
9 with some more specific references to how things work in
02:52PM 10 the bankruptcy.

11 Judge, one of the things that I intended to
12 get up here today, not talking about the bankruptcy code
13 itself, but I intended just to talk about "related to"
14 jurisdiction, and I know it's been briefed, and I'm not
15 going to go over those.

16 I think the trustee did a magnificent job of
17 describing the state of the law of it, but what I did
18 over the last day or so is I had the occasion, there
19 were three District of Massachusetts cases, one
02:52PM 20 bankruptcy appellate panel, two magistrate judge
21 opinions that were adopted by the District Court, and
22 when you read them closely, I mean really drill down on
23 them, they actually support the Sixth Circuit.

24 They don't contradict, and they don't reject
25 the Sixth Circuit approach, and this goes to what you

1 mentioned earlier to me about the Pacor case in the
2 Third Circuit against now Corning, and I know the Second
3 Circuit, from where I come from, is pretty well in line
4 with Dow Corning.

5 But I just want to quickly go through these
6 these cases, then I'm going to get off this rostrum,
7 your Honor. The Cambridge Place Investment Management
8 case dealt with an indemnity agreement. It was adopted
9 by Judge Gordon, 813 F. Supp. 2d 242.

02:53PM 10 What I would do is, you know, there's a lot
11 of discussion at the beginning about the various
12 positions of the parties and the various states of law.
13 I know my friends from the PSC cited some of that in
14 their papers, but I'd refer you to the Westlaw pages 20
15 to 21 where the Court goes through First Circuit law and
16 says the First Circuit has recognized that "related to"
17 jurisdiction is to be construed fairly broadly and
18 encompasses proceedings which potentially -- and that's
19 the significant difference from Pacor, I think -- have
02:53PM 20 the effect on the bankruptcy case such as altering
21 debtor's rights, liabilities, options and freedom of
22 action, or otherwise having the impact upon the handling
23 and administration of the estate, citing Middlesex Power
24 Equipment, 292 F.3d. 61, First Circuit, 2002.

25 The Court then went on to say that clearly a

1 finding of liability pursuant to that potential
2 agreement would effect the estate. Accordingly, it had
3 "related to" jurisdiction. It remanded the case on
4 abstention grounds, and I'm not going to deal with
5 whether that was right or wrong. I'm not even going to
6 deal with that. Those were raised in the papers, and
7 I'm going to leave my friend, Sexton, Mr. Sexton, to
8 argue for that and leave the trustee to his papers on
9 that.

02:54PM 10 Then it went on in the next paragraph to
11 say, even if the Pacor rule was adopted, we'd have it
12 here, anyways. So just from that case, that
13 First Circuit District Court case, I think from a close
14 reading supports the broader view.

15 I'd also refer your case to the
16 Haber v. Massey case. I think that this is actually
17 more on point. It was adopted by Judge Ponsor, 2012,
18 Westlaw, 5398567, and, again, I think it's the same page
19 numbers, Westlaw at page 20 to 21, and this case, your
02:55PM 20 Honor, concerned an auto accident, I believe, but it's a
21 tort case where the driver of a truck was in Chapter 7
22 bankruptcy, an individual liquidation, and the case
23 against him was stayed pursuant to 362 of the code, and
24 the plaintiff went after the truck owner who had
25 vicarious liability, right, you know, alleged vicarious

1 liability, which isn't an automatic indemnification, so
2 to say, I mean, pursuant to Pacor, other things had to
3 be proved in order to prove that case.

4 The Court basically adopted from my reading,
5 and other people may beg to differ, but I think it's
6 pretty clear, the Sixth Circuit rule, and the Court said
7 on pages Westlaw star 20 to 21, "The Court concludes
8 that "related to" jurisdiction over a plaintiff's state
9 law claims is present here."

02:56PM 10 First, courts have explicitly found that
11 tort actions are related to a debtor's bankruptcy
12 proceeding because any disposition of issues in a tort
13 case will be related to the determination of a debtor's
14 liability and would also bear upon any resultant
15 contribution owed, and there it was saying two things
16 because in that case, the liability was linked, the same
17 core facts as we have here. Everything, as the
18 trustee's motion says, goes back, goes back to NECP, and
19 those facts that come from there.

02:56PM 20 Then it talked about resulting contribution
21 owed, not automatic indemnity, and it cited to
22 NUTRIQUEST, which is a District of New Jersey case that
23 was part of the Ephedra bankruptcies, of which Twin and
24 Metabolife were part of.

25 The Court then there, I believe, also on

1 abstention grounds sent it back, but those cases that
2 dealt with abstention, I'm just going to deal with it
3 for one second, Judge, didn't deal with a mass tort, and
4 it's arguably whether this is comparable to mass tort
5 with thousands of cases, but we've got hundreds of cases
6 and potentially a thousand plus cases, and so the issues
7 there are different in terms of abstention from the
8 issues here, and they've been briefed at length.

9 But I would refer your Honor to that case,
02:57PM 10 which is on page -- I'm trying to find it -- 28 where
11 the Court says, "As one Court has observed, the question
12 of abstention boils down to whether in the balance
13 justice is better served by the bankruptcy court or
14 another court deciding the matter. At the heart of the
15 matter is what is in the best interests of the estate."

16 And it's my submission to your Honor today
17 that the trustee has made a compelling case that the
18 best interests of the estate here is served by your
19 taking jurisdiction of these cases for the reasons set
02:58PM 20 forth in the trustee's motions.

21 Lastly, then I'm going to sit down, the
22 Santa Clara case, that's an older BAP case, bankruptcy
23 appellate panel from the First Circuit. It dealt with a
24 guarantee, and that case is a little more opaque, and I
25 had to read it about three times before I decided what

1 it meant, and folks may differ, but it dealt with a
2 declaratory judgment, and also what it dealt with, your
3 Honor, is whether that declaratory judgment invested one
4 party nondebtor with a right to recover from another
5 party nondebtor, who had the principal liability from
6 the debtor, and what I read the Court as saying, first,
7 it's a declaratory judgment.

8 Second, all that happened here was the
9 shifting of liability, meaning it didn't create a new
02:59PM 10 claim, it just shifted the liability from one creditor
11 to another.

12 I think that's not the case here for the
13 reasons stated in the trustees' motion. Indeed, getting
14 back to the thing I put on the side, Judge, defense
15 costs. Any progress of the state court actions is going
16 to create defense costs on the part of the defendants
17 that arguably, potentially, conceivably, to use the
18 Pacor general principle standard, not getting into the
19 third-party part of Pacor would have an effect on the
02:59PM 20 estate.

21 So it's our contention, your Honor, that,
22 you know, there's not just liability shifting here,
23 there's more than that. Any progression of state court
24 litigation, again, increases my constituency, and our
25 goal from the get-go is to make sure that that doesn't

1 increase and that the funds that are available and may
2 be aggregated through the trustees, the PSCs and the
3 committee's good efforts are utilized to pay victims,
4 and that's my presentation. I hope that was helpful,
5 Judge.

6 THE COURT: All right. Thank you. All
7 right. Mr. Sexton, why don't I hear from you next. You
8 can identify yourself for the record.

9 MR. SEXTON: Thank you, your Honor.

03:00PM 10 Scott Sexton from Roanoke, Virginia. Where I come from,
11 *pari passu*, I think, is an Italian dessert we get at the
12 Olive Garden.

13 MR. SOBOL: Come on, your Honor, that was a
14 good one.

15 THE COURT: I hope you brought your winter
16 coat. It was in the 30's last night.

17 MR. SEXTON: I don't have my bankruptcy code
18 either, so Mr. Molton has me up one on that.

19 I would like to address a couple of your
03:01PM 20 questions, if I could. That seems like a good way to
21 start. One of your most practical questions, at least
22 it seemed to me, was the issue of how do you control
23 discovery, and, particularly, I guess, the only
24 discovery we're worried about here at all would be
25 discovery of New England Compounding Pharmacy.

1 That's got to be the only discovery that
2 would be at the attention of this Court, and I would
3 have to say, it is at the absolute bottom of my
4 attention list because we just don't see much there
5 worthy of discovery or needing discovery.

6 THE COURT: But surely the defendant in your
7 case, or the defendants, I mean, I don't know much about
8 the case, obviously, but I can certainly guess that
9 they're going to say we bought this product, we had no
03:01PM 10 idea it was contaminated, we administered it, it's their
11 fault, not ours, and maybe under Virginia law, they're
12 on the hook, but they're going to say, well, this isn't
13 fair, we need the claim against them, and at a minimum,
14 we need discovery from them.

15 MR. SEXTON: Right. I'm sure there is some
16 discovery that we'll be asked for in that case. First
17 off, it's very important to understand Virginia does not
18 have comparative fault, so in this case I don't know
19 what Massachusetts has, but let's say New England
03:02PM 20 Compounding was 90 percent at fault and say InSight
21 Imaging was only 10 percent at fault, it's a joint and
22 several verdict, and there is no apportionment for
23 purposes of contribution.

24 It's pro rata, not proportionate, so you do
25 not even have a claim as one joint feasor for

1 contribution until after you have paid more than your
2 fair share, which if there are two defendants means more
3 than half.

4 So, yes, Harris, Beach made an issue of the
5 fact that you can assert a cause of action for
6 contribution only by third-party claim, only with the
7 permission of the Court at this time, the automatic time
8 period having expired, and so there is no right claim
9 for contribution in Virginia, it's all at the discretion
03:03PM 10 of the Court, and it is, as you pointed out, impossible
11 because New England Compounding Pharmacy is in
12 bankruptcy, which makes them not subject to service of
13 process, which makes them absolutely impossible to be a
14 necessary party in Virginia.

15 I will correct counsel as well. There has
16 not been a motion to implead them as a third party.
17 There has been a motion to dismiss, as she noted, a
18 demur in Virginia alleging that the plaintiff had failed
19 to state a cause of action against InSight for failing
03:03PM 20 to add New England as a party, so that there has not yet
21 been a motion.

22 There was a motion for leave for additional
23 time to file a third-party complaint, which was not
24 granted so that was -- that's as close as they have come
25 to moving to implead.

1 Now, so there's discovery. I mean, in
2 reality, the discovery of whom, the New England
3 executives, the New England people who are on the hook.
4 As we pointed out in our filings, those will be the
5 shortest depositions. They should last about as long as
6 the congressional hearings did, which is long enough for
7 the plaintiff to say are you really going to plead the
8 Fifth to every substantive question, and so I won't be
9 coming up here to take depositions of the New England
03:04PM 10 executives, but certainly somebody might, and I'm sure
11 they'll tell us what they say when they do that, and if
12 the defendant in our cases wants to take their
13 deposition, they will have to go through you.

14 You raised a practical question. I think
15 there was some reference to the fact that just the gates
16 would open and people would be barreling up here to get
17 New England's documents. I'm a little confused by that
18 myself because I saw on the TV that the Federal
19 Government was taking out all those documents at some
03:05PM 20 point, but I assume New England still has some documents
21 that may be relevant and some other evidence that may be
22 relevant.

23 THE COURT: Well, you know, I haven't yet
24 been called upon to address the issue of how, you know,
25 criminal investigations is going to interact with civil

1 discovery, but at some point civil litigants are going
2 to get access to these documents if they want them. The
3 government isn't going to keep them hidden from view
4 forever, at a minimum.

5 MR. SEXTON: Here's a practical, if the
6 "parade of horribles" was that there would be just
7 hordes of plaintiffs' lawyers wanting to take
8 depositions and look at the same document, you have
9 authority over the bankruptcy court that is
03:05PM 10 administering the estate of New England Compounding.

11 It seems to me as simple as you withdrawing
12 the reference as to issues relating to discovery of
13 New England Compounding lifting the stay as to issues
14 related to their insiders, their close associates, and
15 then you would be in direct charge of that, and I assure
16 you, no state court in Virginia is going to tell a
17 District Court sitting in bankruptcy when and how that
18 court's debtor is going to be deposed or is going to
19 produce documents.

03:06PM 20 I don't see any other way than to go through
21 you, and, honestly, I've never assumed there would be a
22 way to go other than through this Court. I think
23 there's also this point that the MDL has a state court
24 liaison.

25 I mean, what's the point of having a court

1 state liaison if you don't have any state court actions?
2 I had assumed that that person was somebody who would
3 actually help us coordinate with the plaintiffs'
4 steering committee, we submit to them, these are
5 documents that we'd like to have, can you help us get
6 them. I can tell you the plaintiffs' steering committee
7 has asked me what types of documents to ask for with
8 regard to certain issues.

9 So, I, again, do not see that as a big
10 problem at all, and I see it something well within your
11 power to control should you choose to do so, and I
12 believe you should choose to do so.

13 So that was the one main reason was that
14 there would be problems with discovery, and I believe
15 that's what the trustee's counsel cited as the big
16 concern for this free-for-all.

17 We just simply don't see the reality of
18 that, and I think Mr. Molton made a much, much, much
19 more cogent argument that I actually understood for the
20 very first time because I think it's actually been said
21 for the very first time, which he said the whole goal is
22 to prevent there from being any other contribution
23 claims, and the only way you do that is by preventing
24 the plaintiffs from actually succeeding in any of their
25 cases, and so he has a worthy goal. His goal is not to

1 have any more clientele, which means there are no more
2 creditors.

3 That's a worthy goal, and it's an
4 understandable goal, and I get it that if you thwart the
5 Virginia cases, then that does have that effect. It
6 does sort of conflict, however, with our American system
7 of justice in that's the problem because it is a totally
8 logical argument to say if you stop these plaintiffs
9 from getting the judgments they're entitled to against
03:08PM 10 nondebtor defendants, then you will in fact stop
11 contribution claims, and I think for the poor plaintiff
12 who does not have the big defendant who will then have
13 his claim decreased by a large contribution claim also
14 made against the estate.

15 The only problem is that this Court does not
16 have the authority to prevent claimants who have
17 interacted, contracted with third-party defendants from
18 pursuing their goals of achieving justice in those cases
19 and against those defendants, and if that in fact gives
03:09PM 20 rise to a contribution claim, then that is something
21 that just comes naturally from that process, but it's
22 simply not part of our system to prevent those parties
23 from pursuing their rights so as to prevent the
24 aftermath of that pursuit.

25 I can tell you in Virginia, a contribution

1 claim, like I said, at most would be half of the
2 judgment, and I believe it would just simply be asserted
3 as a contingency just like our client's claims will be
4 asserted as contingency claims.

5 THE COURT: But if Mr. Molton is right, I
6 mean, let's say that some plaintiff gets a big hit, gets
7 a billion dollar judgment or something, I don't know,
8 even a contribution claim for half that, when it gets
9 presented as a liquidated claim in the bankruptcy court,
03:10PM 10 they take all the food at the Olive Garden, right, I
11 mean, they get everything.

12 MR. SEXTON: In Virginia, I can only speak
13 as to Virginia law, in Virginia that plaintiff who you
14 just described would have to first pay \$500 million plus
15 one dollars before they would have a claim against
16 New England Compounding. The likelihood of that is slim
17 to none, and I think slim just left town, but you just
18 don't have the claim until you pay more than half of the
19 judgment.

03:10PM 20 So it is possible, but, there again, a
21 worthy goal, Judge, but it has never been the policy of
22 American justice to prevent plaintiffs from pursuing
23 their rights of a jury trial just to avoid the
24 consequence of a contribution claim.

25 THE COURT: What about indemnification?

1 Again, obviously, I don't know anything about Virginia
2 law, but isn't there a common law right of
3 indemnification if you're found liable based on someone
4 else's fault, you know, like the liability, the claim
5 that a principal would have against an agent who caused
6 the principal to file?

7 MR. SEXTON: There is a common law indemnity
8 associated with products liability in Virginia. There
9 is no statutory indemnity, and it depends upon the clean
03:11PM 10 hands of the parties seeking the indemnity, and in this
11 case, based upon the facts and allegations we've
12 discovered, there are no clean hands to be found, and so
13 we do not believe there will be an indemnity claim.

14 I think we probably said that in our brief,
15 but you have to have clean hands, you have to have --
16 don't have independent fault, and your liability has to
17 be derivative of the primary defendants such that you
18 can imagine a retailer, like Wal-Mart, selling a lawn
19 mower. All Wal-Mart does is put it on the shelf.

03:11PM 20 THE COURT: Or pharmaceutical, as happens
21 all the time.

22 MR. SEXTON: In pharmaceuticals, they put it
23 on the shelf. In this case, it's different. There's a
24 primary service that intervenes, you have
25 representations made by that primary service provider,

1 you have medicals negligence, Consumer Protection Act in
2 Virginia, Virginia fraud, and so there are any number of
3 cases, I mean, factors in this case which make it almost
4 inconceivable that New England would have an indemnity
5 claim brought after it successfully by the debtor here,
6 the nondebtor party.

7 So I think that is not to be -- that really
8 shouldn't drive it, and it seems to me this idea that
9 you -- the trustee's counsel also said that you could
03:12PM 10 never do a plan until you had some type of knowledge of
11 all these contribution claims, but it seems to me that
12 there's one thing that we know for sure. New England
13 Compounding did not sell these products directly to any
14 consumer.

15 There is no patient out there who injected
16 themselves with this product, and so if you simply
17 assume that every claim that's made against a debtor,
18 there is somebody who has a contribution claim
19 associated with that claim.

03:13PM 20 That to me defines the universe of the
21 contribution claims, and if I were representing any
22 healthcare provider who handled any of these things,
23 regardless of whether I had been sued or not, I would
24 definitely file a notice of claim for contribution,
25 unliquidated, because I know I have that exposure.

1 So I think those are not -- those are not
2 issues that really are going to change based upon
3 whether we're going forward in Virginia or not.

4 I do believe that the trustee has expressed
5 in some respects the kind of -- I think contribution is
6 a rationale here. I think the real reason is expressed
7 roughly on the second page of the brief that was filed
8 on May 2d where the trustee goes into the fact what they
9 are really looking for is contributions from these
03:14PM 10 third-party defendants.

11 It's not the contribution claim from these
12 third-party defendants, it's the amount of money that
13 these third-party defendants can contribute to the
14 trustee's plan that is what's really at issue, and so
15 they've laid it out fairly bluntly.

16 I think the point is to get the third-party
17 defendants before your Court, attempt to engage in a
18 mediation, hold a carrot out for the defendants that
19 they will stay discovery so long as they participate and
03:14PM 20 participate meaningfully and then offer that nondebtor
21 defendant a nondebtor discharge somehow, which I think
22 is dubious in its own right.

23 So that's the reason these debtors are
24 wanted here is not because of the contribution claims
25 they're going to assert but the funds they potentially

1 bring to a pool that would then be part of the trustee's
2 plan.

3 By the way, that doesn't take away or
4 detract anything from the trustee, it doesn't take away
5 or detract anything from the debtor because they are all
6 third-party funds coming into that pool that would be
7 part of the pool, so that, I believe, is fairly squarely
8 addressed in the trustee's filings and certainly in the
9 some of the comments that have been made to you today.

03:15PM 10 Your Honor, I have a practical question that
11 has never been raised, and I'm not posing it to the
12 Court but just posing it for the Court. A practical
13 question that has not yet been addressed in any of these
14 filings, when the trustee filed his original transfer
15 motion, it had a draft order attached to it that
16 appeared like it would just go out to all state courts
17 saying transfer your case up to Boston District Court,
18 and I have looked, with no success, in trying to find
19 any kind of procedural justification for that, and so it
03:16PM 20 is very unclear to us folks in Virginia as to how that
21 leap would be made from a state court to this court
22 unless you --

23 THE COURT: I'm assuming I have to issue an
24 injunction which triggers issues under the
25 Anti-Injunction Act and a host of other type issues, but

1 I don't think I just send something in the mail to the
2 Davidson County, Tennessee court, and, by the way,
3 transfer your case to me. I don't think it quite works
4 that way.

5 MR. SEXTON: It is a matter that we have
6 rather scratched our heads about as to how that would
7 happen, and I would assume it would mean that the cases
8 would have to go through the Federal Court in Roanoke,
9 which, of course, they just attempted that.

03:17PM 10 THE COURT: That's a good point. I can't
11 say that I've thought that through completely myself.

12 MR. SEXTON: Speaking of the Federal Court
13 in Roanoke, your Honor, after the trustee filed his
14 transfer motion in this action, a number of weeks
15 passed, then the defendant, InSight, in that case, in
16 those cases removed them to Federal Court.

17 As you know, Judge Wilson just issued an
18 opinion on that last Friday. Those were 17 cases which
19 I think is more than a handful, and 14 were remanded on
03:17PM 20 three alternate grounds, one of them including
21 untimeliness, and three were remanded on two alternate
22 grounds, not including untimeliness, and, of course, the
23 Court addressed abstention and permissive and/or
24 equitable abstention in all of those cases, and I just
25 wanted to address the statistics as to how many of those

1 there were.

2 THE COURT: All right. Just because we have
3 a lot of ground here, why don't you wrap up, Mr. Sexton.

4 MR. SEXTON: Your Honor, I would be happy to
5 address any questions that you have. I know you've said
6 you read our pleadings. I think I've addressed the
7 questions you asked of the trustee's counsel, so I think
8 we've addressed the "parade of horribles." I don't
9 think there will be a "parade of horribles."

03:18PM 10 We think everything could be orderly
11 handled. We think the "parade of horribles" would be to
12 prevent these parties from having their day in court
13 against these other defendants and that you could
14 control any discovery such that it would be that would
15 occur, and really I'd be happy to answer any questions,
16 but that's....

17 THE COURT: I think, again, to jump to my
18 conclusion, I am going to take these issues under
19 advisement, and I'm going to permit parties to file a
03:19PM 20 very short post-argument supplemental memoranda in a
21 relatively brief window of time. Ms. Parker.

22 MS. PARKER: Could the PSC be heard briefly,
23 your Honor?

24 THE COURT: Yes.

25 MS. PARKER: So the plaintiffs' steering

1 committee largely supports the trustees' motion, but we
2 have advocated that the District Court carve out, that
3 is, not decide whether to exercise "related to"
4 jurisdiction over narrow sets of cases, specifically
5 state court cases against only defendants who are
6 unaffiliated with NECP where the only claim of "related
7 to" jurisdiction is based on a potential, but
8 unasserted, claim of contribution or indemnity.

9 I wanted to address for the Court briefly
03:19PM 10 why the plaintiffs' steering committee cares about this
11 motion. It might be understandable for one to think,
12 well, you're the lawyers running the show in Federal
13 Court up there in Boston, you would want all of these
14 cases to come there, and, admittedly, it would
15 undoubtedly be more efficient if all of these cases, at
16 all touching on anything related to NECP, came to
17 Boston, but federal courts are courts of limited
18 jurisdiction.

19 With that in mind, we have three reasons
03:20PM 20 that we're concerned here: First, we've read the case
21 law. Our reading of the case law, and, admittedly, I
22 think reasonable minds disagree on this -- they
23 certainly have today -- this Court does not have
24 "related to" jurisdiction over cases against nondebtor
25 defendants in state courts where the only issue, where

1 the only allegation of "related to" jurisdiction or
2 potential indemnity and contribution claims.

3 I won't rehash the case law here, we've set
4 it out in our brief, but I will say from the PSC's
5 perspective, if one is being academically honest about
6 the state of affairs, it is at a minimum an open
7 question and one that need not be decided today.

8 The second concerned and ties in with the
9 first. The PSC has every interest in protecting the
03:20PM 10 finality of the settlement or plan here, and along those
11 lines, we're interested in avoiding appeals and
12 potential appeals.

13 We would not want a situation where an
14 appellate court reviews the decision from this Court and
15 reverses because it determines that this Court
16 overreached slightly in asserting "related to"
17 jurisdiction and have a situation where that would
18 effect what is otherwise a final plan or settlement.

19 Thirdly, as I think the dialogue today has
03:21PM 20 fleshed out, there are other tools available here to
21 coordinate and address both indemnity and contribution
22 claims and to control discovery.

23 So I'll focus on discovery first since your
24 Honor seemed to be interested in that in particular.
25 I'll observe that federal and state court judges

1 regularly coordinate discovery in mass tort proceedings.

2 It is not uncommon that they do so.

3 THE COURT: Well, I'm certainly familiar
4 with one federal judge coordinating with one state court
5 judge in the same jurisdiction. It's not so clear to me
6 that I can coordinate with 38 state judges in 38
7 different, I mean, I'm pulling that number out of the
8 air, it could be 178 different judges, or whether I can
9 even keep track of it.

03:22PM 10 One of my fears is that I'll find, you know,
11 that the case in Minneapolis that I've deferred a
12 decision on is in its second week of trial and that
13 events have far exceeded my ability to coordinate
14 things.

15 MS. PARKER: Yes, your Honor, so in which
16 case, the next point may give you some more solace,
17 which is that the All Writs Act and the Anti-Injunction
18 Act, which is 11 U.S.C., Section 105(a), work together
19 to permit a Federal Court to enjoin state court
20 proceedings.

21 So, if it really came down to a concern,
22 those are options. Your Honor referred to post-argument
23 briefing. We'd be happy to brief that further, but that
24 is an option for the Court.

25 Finally, in terms of discovery against.

1 New England Compounding, in order to enforce a subpoena
2 against NECC, someone would need to file a lawsuit to do
3 that, and that lawsuit would wind up within this Court's
4 jurisdiction.

5 THE COURT: But, of course, it isn't just
6 NECC. I don't know the facts well enough, but
7 presumably there were employees, contractors,
8 subcontractors, cleaning people, inspectors, all kinds
9 of people must have been in and out of there, and I
03:23PM 10 would assume discovery is not limited to the five or six
11 executives and shareholders and the company itself, and
12 I'm less sanguine about my ability to control all of
13 that. What my power is over either the person seeking
14 the discovery or the witness is not clear to me.

15 What about this issue -- and your brief was
16 very tempting to me. It appealed, among other things,
17 to my desire to defer every difficult decision I can
18 defer --

19 MS. PARKER: Thank you.

03:24PM 20 THE COURT: -- but I wish it were that easy.
21 You know, basically you say I should deny it without
22 prejudice, don't address issues of potential
23 contribution and indemnity. Well, what about the actual
24 issues of contribution and indemnity? In other words, a
25 non-NECC party that has already either asserted or

1 attempted to assert a contribution or indemnity claim.
2 Is that the break point? Once they've done that, do I
3 now assert jurisdiction over that?

4 MS. PARKER: Yes, your Honor.

5 THE COURT: How do I draw a distinction?

6 MS. PARKER: We would suggest it is a bright
7 line, that once indemnity or contribution claims are
8 asserted, then that triggers the Court's "related to"
9 jurisdiction.

03:24PM 10 THE COURT: All right. Again, presumably
11 every defendant would have the incentive to do that, I
12 would think, yes? I mean, I can't imagine what the
13 disincentive would be.

14 MS. PARKER: I agree with that statement,
15 your Honor, though I can never read the minds of defense
16 counsel.

17 I'll also observe that in terms of tools
18 that are available, New England Compounding -- many of
19 the plaintiffs in the civil actions that we identified
03:25PM 20 as a part of our carve-out have also filed separate
21 cases against New England Compounding that are part of
22 the MDL, so given that New England Compounding can
23 assert, as I think your Honor suggested, indemnity
24 claims in either the MDL action or a separate action,
25 and that would bring those cases within this Court's

1 jurisdiction as well.

2 So in order to resolve this motion, your
3 Honor, you need to consider jurisdiction, mandatory
4 abstention and discretionary abstention. I will address
5 each of those but only very briefly.

6 In terms of jurisdiction, 28 U.S.C. 1334(b)
7 gives original but not exclusive jurisdiction over civil
8 proceedings related to, and we have discussed that I
9 think ad nauseam today, but I will say that the
03:26PM 10 plaintiffs' steering committee's case research suggests
11 that courts almost uniformly hold that a state court
12 proceeding against a nondebtor unaffiliated with the
13 debtor -- I'm sorry, courts almost uniformly hold that a
14 state court proceeding against an entity unaffiliated
15 with the debtor with only hypothetical contribution and
16 indemnity claims are outside of the scope of "related
17 to" jurisdiction.

18 The First Circuit Bankruptcy Appellate Panel
19 that we cited in our brief considered a similar issue.
03:26PM 20 Admittedly, as Mr. Molton pointed out, it is not
21 factually identical, but the First Circuit Bankruptcy
22 Appellate Panel found an insufficient nexus to confer
23 "related to" jurisdiction over state court actions
24 involving nondebtor parties and possible contribution
25 claims.

1 The Third Circuit in the Pacor test is
2 important, I think, and bankruptcy attorneys may point
3 fingers at me, but Pacor is less important for setting a
4 test here but rather because of what it resulted, what
5 it concluded, which is that Pacor did not exercise
6 jurisdiction over potential indemnity claims there.
7 That Pacor result and the text were both cited favorably
8 by the Supreme Court in Celotex, and additional cases
9 since then have cited to that to reach similar
03:27PM 10 conclusion in the Third Circuit and elsewhere.

11 Twin Labs and Dow Corning appear to us to be
12 outliers. Twin Labs is a short order with a single
13 paragraph addressing "related to" jurisdiction that
14 reaches a conclusion and cites Dow Corning but does not
15 do any further analysis. Dow Corning applied the Pacor
16 test and reached a different conclusion than the Pacor
17 Court did.

18 It's interesting to note there that the
19 nondebtor entities that were the subject of that order
03:28PM 20 were other Dow companies in a situation where the debtor
21 was Dow and those other Dow companies were shareholders
22 of the Dow debtor, very different factual scenario as
23 between the relationship of a Virginia pain clinic, for
24 example, and New England Compounding.

25 On abstention, under 1334(c)(2), which

1 addresses mandatory abstention, the bankruptcy code
2 provides that the Court must abstain. In certain
3 circumstances, that evaluation turns on whether claims
4 left where they are will be timely adjudicated.

5 We would suggest that no one here today has
6 argued that there will not be timely adjudication if
7 these cases are left in the state courts. In
8 particular, we have seen action both by the Federal
9 Court on remands recently but also in the Tennessee
03:29PM 10 state court cases that these cases are moving forward.

11 We would suggest that that's another factor
12 that may counsel in favor of waiting to decide this
13 issue to determine whether or not there is any reason to
14 be concerned about the timely adjudication.

15 As to discretionary abstention, there are
16 over a dozen factors that are considered by courts. We
17 have gone through, set out some of those in our brief.
18 I won't go through them all. Some point towards
19 abstaining, we think, some point against.

03:29PM 20 We would suggest that on the whole, they
21 suggest that this Court should abstain, but, again, we
22 urge the Court to refrain from deciding that issue
23 unless it becomes necessary.

24 Under 1334(b), 46, it says, "An exception to
25 the mandatory abstention provision that exception

1 applies only to non-core proceedings. The only
2 exception, the only example of a non-core proceeding
3 that's given in the bankruptcy code is liquidation or
4 estimation of contingent or unliquidated personal injury
5 tort or wrongful death claims against the estate for
6 purposes of distribution."

7 Now, there's two ways to read that phrase,
8 and there's been much case law and much academic
9 discussion about it, but, in any event, the state court
03:30PM 10 cases are not claims against the estate, nor are they
11 being made for purposes of distribution of any sort of
12 plan.

13 Finally, 28 U.S.C., 157(b)(5) says, "The
14 District Court shall try personal injury and wrongful
15 death claims." There's no dispute about what that
16 requires, but that provision cannot create jurisdiction
17 where jurisdiction has not otherwise been granted by
18 Congress. Courts have held that that provision
19 requiring the District Court try personal injury cases
03:30PM 20 applies only to tort claims that are against the debtor.

21 And a few points in response to the
22 creditors' committee and the trustee's argument today,
23 there is no liquidated claim just because there's a \$50
24 million verdict against a pain clinic in Virginia. They
25 would have to file a separate action in order to have

1 that become liquidated, which would bring things under
2 this Court's jurisdiction.

3 While it is noble of Mr. Molton to want to
4 minimize claims against the estate, I think we all share
5 that goal in some sense, at least, but I do note that
6 the right to contribution and indemnification against
7 NECC exists even if those cases come here.

8 Now, there may be means here where we're
9 better able and more efficiently able to address those
03:31PM 10 rights, but they are not erased.

11 THE COURT: Let me ask you, Ms. Parker,
12 assuming that I get over the abstention hurdle, and
13 let's just focus on the "related to" jurisdiction point,
14 is it the committee's view that I do not have "related
15 to" jurisdiction over potential contribution indemnity
16 claims, but if, again, assuming the abstention issue is
17 solved, I could set up a regime where as soon as any
18 party claimed contribution or indemnity, then
19 jurisdiction would attach, and I could bring that case
03:32PM 20 into the court, is that the idea here? I'm struggling
21 to understand how this would work as a practical matter.

22 MS. PARKER: The short answer, your Honor,
23 is, yes, that once a claim is asserted against New
24 England Compounding Company, that those matters would
25 come before your Honor.

1 THE COURT: All right. Here's what I want
2 to do. I want to give the stenographer's fingers a
3 break. I'd like to take a 10-minute break. The people
4 on the phone should probably stay on the phone. When we
5 come back, I want to see if Ameridose and GDC want to
6 weigh in. I think I have a question for either the
7 trustee or Mr. Molton, and I want to see if the four
8 people who want to be heard on the phone want to weigh
9 in briefly as well, and then we need to turn to the
03:33PM 10 other remaining issues before we run out of time. Let's
11 take a break of about 10 minutes.

12 THE CLERK: All rise.

13 (A recess was taken.)

14 THE CLERK: All rise. Thank you. Please be
15 seated.

16 THE COURT: All right. Quickly now, does
17 Ameridose wish to be heard? Mr. Moriarty.

18 MR. MORIARTY: Your Honor, I don't need to
19 be heard on the trustees' motion in general.

03:44PM 20 THE COURT: I'm thinking of your related
21 motions.

22 MR. MORIARTY: The Section 157 motions, I'm
23 not even sure that Mr. Ellis still sees the issues the
24 same way today that he did when he filed his briefs in
25 opposition to that transfer, but let me just say this,

1 that the cases with Ameridose, such as the four
2 Massachusetts cases and the fifteen New Jersey cases,
3 whatever that number is, are very different because in
4 that situation Ameridose is a related entity.

5 The complaints allege that either Ameridose
6 made the product, or, and/or that they are an alter ego
7 of NECC, so that's clearly related to, and I don't think
8 there is a party that has filed a brief that has
9 contested that issue.

03:45PM 10 I mean, the four Massachusetts cases that
11 are in the bankruptcy court, even when Mr. Ellis filed
12 his brief in opposition, he did not contest federal
13 jurisdiction. That's more of an issue of which Federal
14 Court in the State of Massachusetts the case belongs,
15 and we think it's an easy case, as do many others, that
16 it belongs here. There's no reason to have those four
17 cases in the bankruptcy court.

18 The New Jersey cases, you know, clearly
19 that's "related to" jurisdiction, and I can argue the
03:46PM 20 motion for remand separately if you want, or I can stand
21 here and talk about it, but we have other grounds
22 besides Section 157 for those removals and the
23 opposition to remand in the first place.

24 THE COURT: Okay. All right. Counsel for
25 GDC. Mr., is it, Thomas?

1 MR. THOMAS: Yes, your Honor. Your Honor, I
2 actually filed a memorandum in support of the Ameridose
3 motion. I don't have anything in particular to add to
4 that. We're basically in the same position, we're a
5 related entity, and we simply are supporting the
6 transfer and withdraw the reference. We rely on our
7 papers.

8 THE COURT: Okay. Thank you. On the
9 telephone, is Attorney Greg Lyons from Roanoke with us?

03:46PM 10 MR. LYONS: Yes, Judge, I am here.

11 THE COURT: I'll let you say your peace
12 quickly.

13 MR. LYONS: And I am here, Judge, with my
14 partner John Lichtenstein, who is on the pleadings in
15 the case as well. I don't know that we would add very
16 much more, Judge. The one thing that has been kind of
17 talked around but maybe not particularly addressed, I
18 mean, "related to" has certainly been discussed, but how
19 you decide what is "related to," the Third Circuit, we
03:47PM 20 think, has articulated a workable basis for that, and we
21 set that out in our filing, Judge, and we think that
22 provides a good way for the Court to approach this in
23 terms of deciding whether "related to" jurisdiction
24 exists over these matters.

25 The particular matters for which we

1 represent the interveners from the Roanoke area, they
2 were similarly situated to Mr. Sexton's clients. We
3 would adopt and agree with Mr. Sexton's arguments, but,
4 you know, as things stand, Judge, the articulation of
5 the test by the Third Circuit is one that would, when
6 applied here, we think, give the Court every reason to
7 find that there is not "related to" jurisdiction, and we
8 would urge the Court to do that.

9 THE COURT: All right. Mr. Dean also from
03:48PM 10 Roanoke, Rob Dean.

11 MR. DEAN: Yes, Judge, Rob Dean with Frith &
12 Ellerman Law Firm in Roanoke, and I am appearing also on
13 behalf of the Roanoke plaintiffs who have only filed
14 cases against the InSight defendants here in Roanoke.

15 I should state that our three cases were
16 designated on the exhibits to the trustees' motion,
17 having also included a close affiliate of NECC,
18 Alaunus Pharmaceuticals.

19 We have since voluntarily dismissed Alaunus
03:48PM 20 in Federal Court here in Roanoke, and orders have been
21 granted, and our case is consolidated before
22 Judge Wilson, and the cases going forward are only
23 against the InSight defendants.

24 We, again, would join in Mr. Sexton's motion
25 and the reasons for granting abstention in this case.

1 We would also oppose the trustees' motion.

2 Judge, the only thing we wish to add to your
3 decision, and we will follow up if given an opportunity
4 in supplemental briefing before your Honor renders a
5 decision, is that the balance of equity in this case in
6 terms of where the proper forum is for discovery, it is
7 our position that whatever discovery either the InSight
8 defendants or the plaintiffs seek from NECC or its
9 employees in Massachusetts will really be attenuated at
03:49PM 10 best.

11 As Mr. Sexton stated to the Court, those
12 depositions will likely result in the assertions of
13 Fifth Amendment privilege. The documents can already be
14 facilitated through the PSC, and because of that, we ask
15 that you accept their position as well.

16 Finally, Judge, our cases that have happened
17 here in Roanoke are really different than how the
18 creditors' committee is represented to the Court or the
19 trustee is represented to the Court because unlike what
03:50PM 20 the creditors' committee counsel have said, that the
21 goal is to treat all plaintiffs alike and that the
22 InSight cases shouldn't be the more fortunate victim, if
23 there is such a thing, the fact is what happened here in
24 Roanoke is really factually distinct than what happened
25 around the country.

03:50PM

1 Because unlike the Twin Labs case, which
2 really involved a chain of distribution, a wholesaler
3 and a retailer, a debtor and a nondebtor defendant, what
4 we have against InSight is independently tortious
5 conduct, where it wasn't so much that the InSight
6 defendants here in Roanoke were simply selling a Ford
7 Pinto, and our clients were hurt, what they were doing
8 is saying they were selling a Mercedes, and as a
9 consequence of that, really our cases are going to
10 require extensive discovery involving local employees
11 and local witnesses and documents that are located in
12 Roanoke as well.

03:51PM

13 So by consolidating discovery of the other
14 NECC cases in Massachusetts would make sense, we would
15 argue that our cases should be allowed to proceed for
16 pretrial discovery here in Roanoke because this is where
17 the substance of our claims are located and for the same
18 reasons that we urge the Court not to find "related to"
19 jurisdiction, we also urge the Court to abstain from
20 exercising such jurisdiction over our claims as well,
21 and we join in the Gentry, Locke motion.

22 THE COURT: Thank you.

23 MR. DEAN: Thank you, Judge.

24 THE COURT: Elliot Olsen from Minneapolis.

25 MR. OLSEN: Thank you, your Honor. I

1 represent Tracy Maccoux. She is one of the personal
2 injury claimants, and we have commenced a lawsuit
3 against Medical Advanced Pain Specialists, a pain clinic
4 here in Minneapolis, and we would oppose the motion, and
5 we would ask you to abstain from asserting jurisdiction
6 over this claim.

7 One thing that no one has said yet is in my
8 case, at least, I think it's speculative to assume that
9 MAPS is going to pursue contribution from NECC. MAPS
03:52PM 10 may decide, well, we want to get involved in that
11 quagmire, that bankruptcy quagmire. We're going to have
12 to expend a lot of attorney fees, and we may not get
13 much back in the way of contribution, so, you know, MAPS
14 may choose to use its resources elsewhere.

15 It may choose to use its resources in simply
16 defending against this case or trying to settle my case
17 rather than chasing money that just is very speculative,
18 especially for those entities that are simply seeking
19 contribution and don't actually have personal injuries.

03:52PM 20 So I think it's up to MAPS, and I think, at
21 least at this point, the best solution, at least with
22 respect to my case, would be for you to deny the motion
23 without prejudice, as I think you said you were inclined
24 to do, so that's all I have to add, your Honor, thank
25 you.

1 THE COURT: Thomas Martin from Philadelphia.

2 MR. MARTIN: Thank you, your Honor. Here
3 only recently brought to the table, and I think that our
4 case has a little bit of a different procedural posture
5 than anything that's been discussed heretofore.

6 THE COURT: Are you with us? I think we
7 lost him. We'll have to -- all right. Peter, why don't
8 you see if you can reach him. In the meantime, I had a
9 question for the trustee or for Mr. Molton. I'm not
03:54PM 10 sure who's the right person to address it.

11 If I did wind up agreeing with you,
12 procedurally, how do I transfer the state cases here?
13 Do I enjoin state courts around the country? Is that my
14 only vehicle? Mr. Molton.

15 MR. MOLTON: Your Honor, my recollection
16 from some of the cases I dealt on, if there's a transfer
17 order, just a simple transfer order that goes to --

18 THE COURT: What authority do I have to
19 order a Judge in Grand Travers County, Michigan to send
03:54PM 20 his case to me or her case to me?

21 MR. MOLTON: I think pursuant to 157(b)(5),
22 according to the courts that have found that to be the
23 vehicle for such transfer. I don't recall. I mean,
24 your Honor, I can go back and take a look and see what
25 Judge Raycroft did and some of the other Judges did in

1 connection with this and get those form of orders to
2 you, but that's my recollection as I stand here today.
3 I may be wrong.

4 MS. ANDREWS: Your Honor, excuse me, this is
5 Anne Andrews. I'm co-chair of the creditors' committee.
6 I wanted to weigh in on behalf of some victims, but
7 Mr. Thomas, who actually I argued these motions against
8 him in another court, knows the exact vehicle where he
9 brought my cases to that court, so he wanted to address
03:55PM 10 you.

11 THE COURT: All right.

12 MR. THOMAS: It probably worked only because
13 it was acceptable to Judge Raycroft that we do it by
14 this means, but what we did is we filed a motion where
15 we identified the cases that we believed should be
16 removed to this Court. He executed the order basically
17 ordering us to remove those cases that we then filed
18 notices of removal of the cases in the state courts and
19 removed them directly to the Federal Court where the
03:55PM 20 bankruptcy was pending.

21 THE COURT: All right. I'm sorry,
22 Ms. Andrews, is there something else you wanted to say?

23 MS. ANDREWS: Just two brief comments, your
24 Honor. Our committee put in papers, and I'm not
25 addressing you in an official capacity on behalf of the

1 creditors' committee, but as my law firm, Andrews &
2 Thornton, representing a number of victims, well over
3 70. I think the count is up to 80 today.

4 The committee, and, in fact, many victims,
5 victims of our law firm represents central or support
6 centralization of these cases for a number of reasons.
7 I won't go over the law, the cases, but I just want to
8 bring attention to the Court that you've heard from six
9 different firms now, at least three different states,
03:56PM 10 and the concern that my clients have and that I have
11 talked with them, as I know many attorneys have around
12 the country, that without centralization, I ask your
13 Honor who, among God's victims of this tragedy, will you
14 pick to go forward to take from the estate in a way that
15 will reduce from all of the children of the victims of
16 this case?

17 And so we're chasing -- centralization stops
18 that bloodletting of the scarcity, and when we talk
19 about the Twin Labs, the Ephedrine cases and the
03:57PM 20 Metabolife cases, where we had Fortune 500 companies, we
21 had large successful companies that attorneys in this
22 courtroom now represented there, we do not have that
23 kind of assets in this case, so for every discovery
24 order, for every case and for every state, my friend,
25 Mr. Sexton, who I respect and respect the citizens of

1 the great state of Virginia, I don't see them as more --

2 THE COURT: The Commonwealth.

3 MS. ANDREWS: The Commonwealth, thank you
4 for reminding me, since I'm from a western state, but
5 those victims do not deserve more justice than the
6 victims from all 24 or other states at a time greater or
7 less than others, and through the vehicle, we support
8 the trustees' motion, my clients have the same right
9 from all 12 states we represent them from, to share in
03:57PM 10 this estate that will waste quickly if this litigation
11 is not centralized and if all these people are allowed
12 to go forward for every discovery motion, for every
13 request in a state court, for every order, there will be
14 five or six reactive orders, growing and growing the
15 estate's costs and ultimately ending up in the same
16 place where the victims will recover in the bankruptcy
17 court, so we're asking for centralization, we're asking
18 for and support the trustees' motion and hope that this
19 case will be centralized quickly.

03:58PM 20 THE COURT: Thank you. Mr. Martin, are you
21 back on the phone?

22 MR. MARTIN: I am, your Honor. Am I being
23 heard?

24 THE COURT: Yes.

25 MR. MARTIN: Very quickly, your Honor, we

1 represent Dale Devilli. We filed an action in
2 New Jersey State Court naming various healthcare
3 providers as well as Ameridose and other NECC-related
4 entities. We filed after the bankruptcy, so we did not
5 name NECC as a defendant.

6 In the notice of removal that Ameridose
7 filed in New Jersey District Court, they suggested that
8 the negligence claims against the New Jersey healthcare
9 providers should be severed, and we frankly think that's
03:59PM 10 a pretty good idea.

11 The concerns that a number of counsel have
12 raised about the ability to proceed in these tort
13 actions we share, and I think that the ability of the
14 Court to sever the state law actions and remand them
15 while keeping the NECC-related cases gives the Court the
16 opportunity to, along with that order, direct that any
17 discovery directed at NECC-related parties or activities
18 be subject to the ongoing supervision of that Court.

19 THE COURT: All right. Thank you. Here's
03:59PM 20 what I'm going to do. I'm going to ask that any party
21 that wishes to follow up with a post-argument
22 memorandum, supplemental memorandum may do so. I think
23 because I can't let this sit very long, I think I'd like
24 that to be filed why don't we say by Monday of next
25 week, which is, what, the 20th?

1 THE CLERK: Yes.

2 THE COURT: I'm not going to put a page
3 limit on it except, again, I'm more likely to read it
4 carefully the more succinct it is. Don't assume based
5 on my ignorant questions or anything else I've said that
6 I'm leaning in any particular direction. There are
7 strong countervailing issues going both ways here, and
8 I'm going to make the best decision I can under the
9 circumstances, but I'll give the parties an opportunity
04:01PM 10 to file one more round of briefing.

11 Please, while on the subject, and as a
12 housekeeping matter, we have lots of filings that have
13 both the MDL number and the Erkan number, which I think
14 is a mistake at this point. I don't know if I need to
15 issue an order to clean that up, but things really ought
16 to be filed in the MDL number that apply to everything.

17 I keep having to go back and forth between
18 the MDL and the Erkan docket, and Erkan was the first
19 case, and I issued some orders in that, and, again, if
04:01PM 20 there's something I need to clean up, I'm prepared to do
21 that. I want things applying to all cases or of general
22 significance to be on the MDL docket.

23 MR. MOLTON: Judge, can I add one thing --

24 THE COURT: Yes.

25 MR. MOLTON: -- because I came here to speak

1 about the "related to," and your Honor posed a number of
2 bankruptcy questions. On the issue of whether the
3 bankruptcy court does have the authority to subordinate
4 contribution and indemnity claims --

5 THE COURT: Yes.

6 MR. MOLTON: -- your Honor may want to look
7 at 510 of the bankruptcy code, which does allow
8 equitable subordination based on case specific and fact
9 specific circumstances, and 509(c) that deals with
10 contribution and indemnification claims.

04:02PM 11 I'm talking about how and when they get
12 subordinated. I'm sorry I didn't raise that to your
13 Honor, but I was trying to do my best under
14 circumstances where, you know, your Honor asked some
15 questions.

16 THE COURT: Well, that's one of the reasons
17 I want to allow supplemental briefing, but so the
18 concept there is it's not necessarily true that every
19 unsecured creditor has to be treated *pari passu*. There
04:02PM 20 might be equitable considerations where that is trumped.

21 MR. MOLTON: That's true. That's 510 and
22 509 deals specifically, your Honor, with indemnification
23 and indemnity claims under various situations. I know
24 various circuits deal with that provision differently.
25 I haven't looked at it recently in the context of the

1 First Circuit, but maybe we'll write about that to your
2 Honor during that time.

3 THE COURT: All right. Let's take up the
4 trustee has moved for limited relief from the Court's
5 order as to the preservation of potential evidence. The
6 government has filed a response that provides for some
7 perhaps more elaborate than necessary notice provisions.

8 What I was going to propose is that because
9 all of this has happened somewhat quickly, I think
04:03PM 10 within the last day or two, that perhaps the government
11 and the trustee, see if they can agree on an order. I'm
12 not sure anyone opposes this. The time hasn't run yet.
13 Is there anyone who wants to be heard in opposition to
14 it?

15 At least the general concept is, you know,
16 to the extent that there is a real estate lease,
17 equipment lease or whatever, it's theoretically
18 evidence, on the other hand, it costs money. Is there a
19 good reason not to or to require the estate to continue
04:04PM 20 payments on this, or can we let it go?

21 Is there any further evidentiary value to be
22 had from it? I'm assuming, of course, that anything
23 that contains information or data like a computer system
24 has been otherwise preserved. I hope we're talking
25 about other kinds of equipment.

1 Does anybody want to be heard on that? What
2 about my idea for the trustee and the government to see
3 if you can agree? The government's proposed, among
4 other things, newspaper publication, even though I guess
5 I'm still a lawyer, does anyone actually read newspaper
6 publications?

7 MR. SOBOL: Some people read the bankruptcy
8 code, your Honor.

9 THE COURT: Well, you have to do that. I
04:05PM 10 suppose some people have to read the newspaper
11 publications as well, but I certainly don't have a
12 problem with a notice procedure that's at least, if it
13 moves expeditiously, to make sure that if there's some,
14 you know, criminal target or subject, or for that
15 matter, for anyone else to at least weigh in.

16 Yes, Mr. Cunha.

17 MR. CUNHA: Yes, your Honor, and from the
18 government's perspective, we're more than happy to work
19 with the trustee, and our intent in proposing the notice
04:05PM 20 regime is not to be excessive or unduly burdensome, but
21 in a belt and suspenders sense to the extent that
22 there's anyone out there, since the government no longer
23 has a need to retain these items that might have an
24 interest or claim, we want to make sure that they have
25 that opportunity to be heard. There probably is a way

1 short of newspaper publication to do that. We're happy
2 to work with the trustee.

3 THE COURT: And, again, to the extent -- I
4 mean, I'm speaking from an old-fashioned perspective,
5 that computers are separate from other items, and, of
6 course, almost every item we have nowadays has a
7 computer chip in it. I don't know what data can be
8 downloaded from what, but my assumption is that to the
9 extent that there is data or information that can be
04:06PM 10 preserved, it will be preserved independent of whatever
11 these things are.

12 I mean, for all I know, it's the lawn mower.
13 I don't know necessarily what this equipment is. There
14 was a schedule filed, but I didn't look at it very
15 carefully.

16 MR. CUNHA: I'll let the trustee speak more
17 specifically, but I believe that much of the property,
18 things like water coolers and postage meters, are
19 probably wholly irrelevant, and to the extent that there
04:06PM 20 is some computerized component to something else, my
21 understanding is that it has been preserved, and our
22 understanding is that it would be preserved.

23 THE COURT: And I don't know whether people
24 want an opportunity to photograph things, I don't know
25 the answer to any of that, but I would expect to grant

1 that motion, and if someone does have an opposition or
2 wants me to do something different, they should respond
3 quickly.

4 MR. GOTTFRIED: Your Honor,

5 Michael Gottfried for the trustee. Two points.

6 Certainly we're willing to work with the U.S. Attorney's
7 Office. We certainly conferred with them on several
8 occasions prior to actually filing our papers and indeed
9 made several revisions to what we proposed based on
10 their good input.

11 Second, this is a two-step process, so one
12 step is to reject the leases; the second step is to get
13 relief preservation order. Really this motion in front
14 of you, your Honor, is directed to the second piece,
15 relief from the preservation order, and I did want to
16 make the Court aware that some of the lessors have
17 assented to rejection of the leases, and those motions,
18 some of them are actually pending in front of
19 Judge Boroff, and several will be heard tomorrow.

20 All of those motions are subject to the
21 preservation order, so whatever this Court ultimately
22 decides with respect to notice and process will not be
23 affected by whatever Judge Boroff does tomorrow, but I
24 did want to make you aware of that, your Honor.

25 THE COURT: Thank you. I didn't know the

1 timing of it, but I assumed as much. Again, from my
2 perspective, if there is an issue, it's preservation.
3 In other words, you might want to photograph something,
4 you might want to inspect it, you might want to download
5 data, but a postage meter, I'm having trouble seeing why
6 that lease can't be rejected.

7 MR. GOTTFRIED: The trustee agrees with you,
8 your Honor.

9 THE COURT: All right. The steering
04:08PM 10 committee's motion to partially lift discovery. I don't
11 know if it's ripe in the sense that the time for
12 opposition has run. My instinct certainly is to grant
13 it, but I obviously want to give parties an opportunity
14 to address this issue.

15 I know we're still just getting organized,
16 but I am anxious that every day or week or month that
17 goes by, discovery is becoming staler, and I would like
18 the parties who are actually going to litigate the
19 claims a reasonable opportunity to do so. Mr. Sobol.

04:09PM 20 MR. SOBOL: Yes, your Honor. So, first,
21 it's my understanding, I'm pretty sure that the time for
22 filing an opposition expired yesterday.

23 THE COURT: Expired yesterday.

24 MR. SOBOL: Correct.

25 THE COURT: That's right. You said you

1 filed it in time to get the opposition.

2 MR. SOBOL: So it would be dealt with here
3 today. So the motion is ripe for you to rule on it.
4 There has been no opposition that has been filed. In
5 order, and although that's the case, I want to take a
6 couple of steps back to sort of frame what it is that
7 the PSC will actually be doing so you can also have a
8 little bit better understanding of at least a portion of
9 the case management issues that are attendant to this.

04:09PM 10 First, you'll recall, your Honor, that you
11 appointed the PSC back in the second week or so of
12 April. Shortly after that I sat down with the trustee,
13 Paul Moore. Over the past four weeks or so, we've
14 established obviously a good working relationship, as
15 well as some substantive understandings about various
16 things that are going on that are sort of -- that he's
17 dealing with and that the PSC will be dealing with, and
18 that helps understand why it is we've asked for what
19 we've asked for in the motion and what it is we haven't
04:10PM 20 asked for, which I wanted to address briefly to you.

21 Again, I'm doing this not because of the
22 motion itself, but, frankly, there are some important
23 issues about case management that are going on that I
24 think it's helpful to air before you.

25 So there are, at least in my understanding,

1 other than NECC or NECP itself, there are three other
2 levels of actual or potential defendants or
3 nondefendants, depending upon whether the liability
4 exists there or not.

5 The other three levels are, first, the NECC
6 insiders, the Caddens, the Conigliaros, the individuals
7 who actually own the companies, along with all the
8 myriad companies that are affiliated with NECC, so that
9 includes Ameridose and Medical Systems or Sales
04:11PM 10 Management, Alaunus, GDC, and I think our count total is
11 about there are actually 19 entities that are in our
12 view affiliated with NECC which we've shared with
13 Mr. Moore and Mr. Gottfried to be able to help define
14 what we understand is that group of actual or potential
15 defendants.

16 There's then, second, what I call the
17 national defendants, meaning those companies who were
18 involved with respect to the allegedly defective
19 products at a national level, and, therefore, may or may
04:11PM 20 not be exposed nationally to persons all throughout
21 wherever the product was distributed.

22 Those might be companies that were involved
23 in, for instance, the testing, or the creation of the
24 clean room or who was supposed to be cleaning the clean
25 room, or what have you, those are people who would

1 theoretically be exposed nationwide, and then finally,
2 of course, there are the state and localized entities,
3 which you spent most of your time this afternoon
4 addressing, essentially clinics, although I recall in
5 some situations physicians who actually dispensed, and
6 it would only be liable to a certain group of people who
7 had actually in some way come in contact with the
8 product or the product as adulterated or allegedly
9 adulterated by the clinic.

04:12PM 10 Now, I set that out because--

11 THE COURT: Isn't there a fourth category of
12 people who were on the ground in Massachusetts, for
13 example, former employees of the company or people who
14 were subcontractors, contractors, in other words, people
15 who might not be in the zone of management necessarily
16 but, nonetheless, might be percipient witnesses?

17 MR. SOBOL: The answer to that is yes. I
18 think they come in two varieties. One is I would call
19 them actually national defendants, although they're from
04:12PM 20 Massachusetts, if they were involved in the creation of
21 the product, they could distribute nationwide, then
22 they're potentially liable nationwide, so I put them in
23 that bucket.

24 There's an issue which I'm not addressing
25 today which is what about other former or current

1 employees but not principals at NECC? Where are they
2 going to go? Do they have contribution indemnification
3 claims? Don't they have to be released as a part of a
4 global settlement? I'm not really addressing that here
5 today, but you're right to identify that that's out
6 there.

7 Now, with respect to the NECC and the
8 NECC-affiliated entities and persons, there has become
9 an understanding, which is that the trustee is in the
04:13PM 10 process of trying to undertake what would be a
11 resolution with all of those persons and entities to
12 create a pot, which pot eventually would become subject
13 to a bankruptcy plan and an allocation and a release.

14 Because I've come to an understanding with
15 Mr. Moore that your negotiation right now is your
16 negotiation, and when as, and, if appropriate, other
17 people be brought in, including myself, to make sure
18 that the settlement is satisfactory or not, that's fine.

19 Obviously in the context of a plan as well,
04:14PM 20 the creditors' committee would want to know what the
21 proposed resolution is, the amounts, the basis for it
22 and sign off on it as well.

23 For the time being, we are hands off. There
24 are some issues though that are back and forth on that.
25 So, we've said, we, the PSC has said then we won't take

1 any discovery, we won't racket up any bills with respect
2 to those entities, we're not interested in doing it, you
3 stay away from us, you don't take discovery with respect
4 to us because you don't need any discovery from us,
5 you're in the middle of a settlement right now, let's
6 just leave that be as it is, and I'll see how things go.

7 So with respect to taking discovery of those
8 entities and persons, they're not a subject of the
9 motion, okay. There may be an issue which I've only
04:14PM 10 recently brought to their attention, and we're going to
11 try and work out, which is whether those entities and
12 individuals we should negotiate a tolling agreement
13 because there are people who have unfiled cases that are
14 out there who may feel that they have some reason to
15 file but who there are lots of reasons why they
16 shouldn't be forced to file right now for the time
17 being, and, therefore, from my point of view, at least
18 as a matter of principle, and I'm just beginning this
19 negotiation, to find out whether or not a *quid pro quo*
04:15PM 20 for this hands-off attitude is also that you agree to
21 some kind of reasonable tolling agreement which we can
22 work out. That's a part of it.

23 Now, also in the context of so we're not
24 seeking discovery from those entities, we're going to be
25 seeking information from everybody else, so from the

1 clinics and from the national defendants, whether they
2 are defendants here or whether they are nonparties that
3 have information that relate to this issue because a
4 part of what the PSC plans to do is to find out the
5 truth about what it is that happened here, find out what
6 products were distributed from NECC, when, to whom, what
7 they did with them and who they distributed them to,
8 some basic facts about what's out there.

9 During that process, if any of those
04:16PM 10 national or state-based defendants want to join a
11 discussion that's happening with the trustee or the PSC
12 or the creditors' committee with the PSC, then that's
13 what they'll do, and we'll stand down, but we're going
14 to go forward with discovery with respect to that.

15 Now, the intention of the PSC is to
16 undertake this discovery in a judicious manner, meaning
17 we are not trying to just undertake discovery for
18 discovery sake. One thing we're trying to be mindful,
19 for instance, is whether or not any of these defendants
04:16PM 20 or potential defendants have wasting policies, that we
21 don't end up wasting the policy or that you know about
22 it, just like you would in any other tort case, you'd
23 sort of have to balance what information you have versus
24 the defense costs that you've racked up, so that will be
25 a part of what it is that we address as well.

1 I should also be mindful, by the way, that
2 in the context of the tolling agreement, one other thing
3 that has begun is a discussion regarding presenting to
4 this Court an order that to the extent the Federal Court
5 or this Court has the jurisdiction and the authority to
6 toll or stay the operation of prefilling or post-filing
7 deadlines that are imposed by state law of some sort,
8 that that might exist, but, obviously, plaintiffs to the
9 extent they want individual relief and believe that the
04:17PM 10 Court's in a position to grant it would have to come
11 forward individually and seek more specific or other
12 relief, and, similarly, a defendant can come forward
13 with respect to that.

14 Now, the creditors' committee reviewed the
15 motion to lift the stay for discovery, raised some of
16 the issues that I've identified that the PSC has been
17 addressing. We've come to an understanding that there's
18 going to be a further dialogue. I've indicated to them
19 that I'll have a teleconference or a meeting where we
04:18PM 20 sit down and any further concerns about discovery with
21 respect to wasting policies, or, you know, making sure
22 that we get a tolling agreement in place or in the
23 process of doing that, you know, get the other order in
24 place I mentioned, that we get those things in place,
25 and I think there were -- well, we're going to do that.

1 I made a commitment to them I'm going to do
2 that, that's what we're going to do. We'll have that
3 meeting, we'll have that dialogue, just to make sure we
4 get this thing off the ground and running the right way.

5 That's sort of an overview, if you will, of
6 why it is we're asking for what we want and why we're
7 not asking for anything further. On this piece of
8 things, there's some other case management issues I
9 wanted to address whenever we get to that.

04:18PM 10 On this piece of things, I would just
11 finally want to add that there was a misstep maybe or a
12 misunderstanding, which I think is in the process of
13 being taken care of, but my understanding is about the
14 scope of who has been in the discussions with Mr. Moore
15 is based on my discussions with Mr. Moore.

16 I think that he has a pretty firm
17 understanding about how global his negotiations have
18 been. I'm not sure whether or not everybody on the
19 defendant's side, who is within that group, has the same
04:19PM 20 understandings or not, but that's just a function of
21 communication, which they'll have, right, and it's
22 completely understandable in a situation like this.

23 We've got a core group of people who are
24 trying to have a discussion and working with principals,
25 but then you have other people that are out there

1 representing entities, and they might have been retained
2 by insurance companies somewhere, so that's all neither
3 here nor there. What I'm basically saying is my
4 statements about my understanding about what's been
5 going on are from Mr. Moore.

6 There might be some other impressions, but,
7 frankly, I'm very comfortable that that's going to be
8 worked out. Now, again, there's other case management
9 issues at some point, but that sort of deals with
04:20PM 10 lifting the discovery piece of things for the time
11 being.

12 THE COURT: All right. Let me pause there.
13 Does anyone else want to be heard on that topic? Okay.
14 Hearing nothing, do you want to take up your other case
15 management issues?

16 MR. SOBOL: Yes, your Honor. Well, the next
17 case management issue I'd like to address and actually
18 have Ms. Dougherty address the website, then I would
19 address a couple other things.

04:20PM 20 THE COURT: All right.

21 MS. DOUGHERTY: Good afternoon, your Honor.
22 Things are ever changing, noting with the website, we
23 just got a further e-mail, but we are working on some
24 way of moving forward in a cost efficient manner in
25 order to get a website set up for the MDL web page, and

1 the idea was to have that linked with the creditors'
2 committee website, and so we have had some back and
3 forth with respect to the content that would be on that
4 web page and how that would be uploaded and the costs
5 related to that.

6 There is some concern that the MDL web page
7 is going to be subject to the control and approval of
8 the creditors' committee. We've raised that concern.

04:21PM 9 We, as of this morning, were hopeful that
10 that issue was resolved. We were told it was resolved,
11 but since we've been sitting here in this courtroom,
12 I've now seen an additional e-mail stating that that is
13 not resolved, so we're going to continue to work hard to
14 get this resolved because we think it's very important
15 for the victims here to have access not only to the
16 information related to the bankruptcy but also to the
17 information related to the MDL procedure, the orders
18 that you have put in place, eventually access to a
19 master complaint, to a short form complaint, to a
04:21PM 20 profile form or fact sheet.

21 All of that information is equally
22 important, and we want to be able to share that
23 information. We are asked by the trustee to work with
24 the creditors' committee to use one website, and we've
25 been attempting to do so.

1 Hopefully we can move forward in that this
2 is just a bump in the road, and we'll be able to get
3 that issue resolved so that the MDL page will have the
4 content that is needed without the supervision and
5 control and approval of the creditors' committee, and
6 if, in fact, we have to get a separate website, you
7 know, that will be unfortunate, but we'll do what we
8 have to do to make sure that the victims that need
9 information related to the MDL proceeding are able to
04:22PM 10 get that.

11 THE COURT: Okay. Mr. Sobol.

12 MR. SOBOL: I think that the ultimate choice
13 that the PSC will have, your Honor, is whether or not we
14 bring a matter to your attention that lawyers should be
15 embarrassed about.

16 THE COURT: If that were the standard, my
17 workload would be cut dramatically. I'll leave it to
18 your collective good judgment.

19 I've said in the past, there's no reflection
04:23PM 20 on anymore in this room, I've said that the best
21 training for being a Judge is being a parent of teenage
22 children because it's often very much an identical
23 dynamic, but, you know, in all seriousness, I understand
24 you're not going to be able to work everything out.
25 Some of that I'm going to work out myself, some of it

1 I'm going to kick to the Magistrate Judge. It depends.
2 I haven't heard anyone say yet that there's a problem,
3 at least as to the last couple of issues that require my
4 immediate attention. I have lots on my plate. If I
5 have to resolve it, I will, and if I think it's
6 appropriate for the magistrate, I will send it to her.

7 MR. SOBOL: Fair enough. As a practical
8 matter, you know, it would be a shame if people couldn't
9 figure out a way to have one website for the victims in
10 the case.

11 THE COURT: I don't know what the issues
12 are. I make no comment.

13 MR. SOBOL: Right. There are other two case
14 management issues I wanted to address with you, your
15 Honor. As you can see, the bankruptcy court has under
16 way some case management on its own, which it's been in
17 the process of doing.

18 Before this Court, we have the PSC has
19 circulated a draft, which is very much a DRAFT, I'll put
04:24PM 20 all caps, bold, italics, underlined, any other font we
21 can put on it, to whoever is in the MDL who wants to
22 give comments to it, suggestions, all the rest of that
23 so that we can get in place something to that effect.

24 THE COURT: I'm sorry, draft case management
25 order?

1 MR. SOBOL: Yes, case management order, yes.
2 That essentially is intended, your Honor, to address
3 some of the items that I've mentioned to you today, you
4 know, a tolling agreement, the order regarding pre- and
5 post-filing requirements, some idea about how long this
6 discovery process is going to be undertaken before we
7 make a decision whether we're going to fish or cut bait
8 with those people who want to put money into a pot and
9 peel off the NECC bankruptcy and whoever wants to
04:25PM 10 participate in that and find out who wants to be left,
11 trying to put some timing on those features of things.

12 In broad brush, I don't want to get into
13 most of the details, but that's essentially what it is
14 that we're trying to address there.

15 THE COURT: Does it also take up the issue
16 of master complaints and master answers?

17 MR. SOBOL: It does, it does, so the notion
18 is the timing of when the master complaint would be
19 filed, how people would participate into that master
04:25PM 20 complaint, when answers would be filed. That's all a
21 part of it.

22 I had been a little bit too hopeful to
23 actually being able to circulate a draft so that even
24 the Court might see something right now, but, frankly,
25 we haven't been able to get our act together enough to

1 be able to do that. We'll do that soon and commit
2 hopefully to have either an agreed upon case management
3 order or proposed versions of case management orders
4 from various constituencies by the next status
5 conference so that you can have that, your Honor, at
6 that time.

7 Related to this is that we're going to have
8 to start a dialogue, and I'm starting a dialogue with
9 the trustee, and I will with others this week, but in
04:26PM 10 this situation where we have the bankruptcy court doing
11 its case management and the District Court doing its
12 case management, there also needs to be some case
13 management between this district court and the
14 bankruptcy court.

15 That's very classic in these kinds of
16 situations, and sometimes that can remain very informal,
17 but sometimes aspects of it should be formalized,
18 sometimes courts do that *sui sponte*, sometimes the
19 parties come to an understanding, make a proposal,
04:26PM 20 sometimes they have very different proposals, okay, but
21 certainly the PSC knows that that's something that needs
22 to be done.

23 We have our opinions about it. We're going
24 to try to get and be educated by everybody else, also,
25 so that in a timely fashion before we have the next

1 status conference, it's ripe for decision or argument,
2 just like the case management order, that issue in terms
3 of whether, and, if so, how to address case management
4 between the bankruptcy court.

5 THE COURT: I think that issue will probably
6 be relatively easy to resolve one way or the other. I
7 think Judge Boroff and I, at least in the past, have
8 seen eye-to-eye, and I think we have a good
9 relationship, and that's a phone call that's easy to
04:27PM 10 make, if it comes to that, but I will call him and just
11 touch the base, which I haven't done in a little while,
12 and see whether there's anything we need to be paying
13 attention to from our end.

14 MR. SOBOL: There's also one last issue,
15 which I'm going to flag to you, but I'm flagging it to
16 you because if you get an emergency motion tomorrow or
17 Thursday or Friday, I don't want to have not flagged it
18 to you today.

19 There is a major concern, your Honor, that I
04:28PM 20 have, as lead counsel for the plaintiffs' steering
21 committee, that other people are sending letters to
22 clinics and other people trying to have a dialogue, a
23 settlement dialogue, outside of the PSC process, and I'm
24 trying to find out who got those letters, when they got
25 the letters, to make sure that actual or potential

1 defendants know your order, which is obviously an effort
2 to put some kind of cohesiveness on discussions that are
3 happening by way of settlements.

4 I'm going to continue to try to do that over
5 the next two days to avoid your intervention, but there
6 may end up being a situation where I have to file an
7 emergency motion before you because there are people out
8 there being confused about who and when and how they
9 should speak to people about settling or not settling
04:28PM 10 this case.

11 THE COURT: All right. Does anyone want to
12 respond to any of that?

13 MR. FERN: Judge, not a way of response but
14 some additional information the Court might be
15 interested in. I have seen the draft PMO that the PSC
16 has drafted. My comments via red line went back to the
17 PSC yesterday afternoon about 24 hours after I received
18 them.

19 What has not been spoken about, Judge, in
04:29PM 20 way of the discovery to be taken of Level II and
21 Level III defendants, what Mr. Sobol calls the national
22 defendants or the state specific defendants. What that
23 bespeaks is some discovery from NECC, documents which
24 are necessary to identify many of those defendants and
25 what role they had in way of what they received from

1 NECC or what goods and services NECC received from them.

2 There was an informal discovery that came to
3 our attention in conjunction with the trustee. We have
4 negotiated that informal discovery, and my office is
5 currently in the midst of gathering the documents that
6 we have agreed to. It will be some time, but we will
7 produce them on a rolling production as they become
8 available.

9 Documents that were originally paper
04:30PM 10 documents and were scanned will be much easier, and they
11 will be produced first. ESI discovery will come, is
12 also being processed, and that will come later in the
13 rolling production.

14 What is necessary that also has not been
15 spoken of is a protective order. My office drafted a
16 protective order. It was sent out to the PSC 10 days
17 ago. Some of that red lines came back to us also in
18 conjunction with the trustee. The second draft of the
19 protective order has been circulated among all the other
04:30PM 20 defendants. I am waiting for their comments back, and
21 then the next draft will go back to the PSC.

22 It is our intention, Judge, that after that
23 protective order stipulation is fully negotiated and
24 completed, we will submit it to the Court to be so
25 ordered.

1 So, there are a lot of different maneuvers
2 and things taking place simultaneously with both the
3 PSC, with the trustee, with my office and others, so we
4 are making progress, we are moving forward to get this
5 case off of first base and moving to a point where we
6 can get that compensation pool available to the
7 claimants. Mr. Sobol.

8 MR. SOBOL: Mr. Fern is absolutely right. I
9 forgot to mention that there is some informal
04:31PM 10 discussions that are going on, and he's been very
11 responsive, as has the trustee, in terms of that
12 informal discovery, and, yes, one of the other things
13 with the case management order was also the protective
14 order issues as well.

15 THE COURT: Ms. Andrews.

16 MS. ANDREWS: Yes, your Honor, Anne Andrews
17 on behalf of the creditors' committee. We are delighted
18 to hear about the discovery plan and the judicious
19 words, the word "judicious" used by the steering
04:32PM 20 committee, and I think I've already said on behalf of my
21 clients but can say whole-heartedly on behalf of the
22 creditors' committee how much economy this case requires
23 and how willing we are to meet and to hone discovery
24 across the country with the challenge of 79 pain
25 clinics, and now we're up to 24 states or so.

1 What I want to tell the Court is that the
2 committee in its work, which we don't often report to
3 you on this kind of level, but I think it's important
4 that we do to you today, the committee and its
5 co-chairs, Mr. Coren, who's in the courtroom today, and
6 myself and our committee, sent out a letter to each and
7 every pain clinic as the official creditor group telling
8 them about the bankruptcy and asking them to contact the
9 creditors' committee just to dialogue with them about
04:33PM 10 bankruptcy proceedings.

11 The copy of that letter was attached and has
12 been circulated. I'll be happy to give a copy of it to
13 Mr. Sobol if he doesn't have it. He is a member of our
14 committee. It might have escaped his attention, but we
15 have an open request for them to contact us as the
16 creditors' group, something that routinely happens in
17 every bankruptcy case, and is in no way intended to, as
18 we get acquainted and work together and will work
19 together, trip over each other's responsibilities, and
04:33PM 20 they are responding.

21 There will be at some point a discussion
22 where all are brought into the room to move this
23 forward, but, quite frankly, many of them are anxious to
24 hear from somebody who wanted to tell them about a
25 bankruptcy so far away that has perhaps so much impact

1 on their clinics and their patients and their presence
2 in this case without being present, if you will, so with
3 that I just wanted to let the Court know.

4 THE COURT: All right.

5 MR. MOLTON: Your Honor, just a few things
6 to end up.

7 THE COURT: Yes.

8 MR. MOLTON: Basically I'm hop-skipping
9 because part of this deals with status update of the
04:34PM 10 bankruptcy proceedings. With regard to the website, I
11 think the parties are working in good faith to get this
12 done. We're letting the invited, and at Mr. Moore's
13 request, and basically at our agreement, to let the PSC
14 basically get on our back with respect to the website.

15 We're working out those protocols. I think
16 the motion is on tomorrow, and Ms. Dougherty and one of
17 my partners, Rebecca Fordham, are going to make that
18 happen, so one way or another, although there are issues
19 with it, we're seeking to get it done, and I think
04:34PM 20 everybody is working in good faith, and I wanted to make
21 that clear.

22 Mr. Sobol referred to Mr. Moore, the
23 trustee's negotiations with what we call first here
24 insider defendants. There was a protocol entered
25 between the committee and the trustee with the

1 committee's consent in the bankruptcy court that
2 established that protocol, and Mr. Moore has, you know,
3 as Mr. Sobol aptly and ably described, Mr. Moore is
4 running that and realizing that creditor and plaintiff
5 consent is crucial to any agreement going forward at the
6 appropriate time. He's going to bring us into that
7 under his discretion and at that time.

8 Mr. Sobol accurately set forth our agreement
9 regarding the discovery order, and I appreciate that.

04:35PM 10 We've been -- we're taking a look at the CMO, and we're
11 going to be circulating red line to Mr. Sobol as well on
12 that and hopefully having discussions among the trustee
13 ourselves and Mr. Sobol so we can get that all on the
14 same page.

15 I think Mr. Sobol was correct in noting the
16 committee's had some concerns about some issues, and we
17 will be discussing that with him on a going forward
18 basis and his folks in good faith.

19 Lastly, Ms. Andrews just remarked about the
04:36PM 20 committee's efforts, and I do want to note, your Honor,
21 and we understand Mr. Sobol's role in this case,
22 acknowledge it, and are working with him on it, but one
23 of the points that we do want to make is, and I'm citing
24 Collier on this, your Honor, "A committee's role in the
25 plan process is probably the most important role in any

1 case." It's Collier, 1103.05.

2 Norton, another bankruptcy treaty, 98.34,
3 the legislative history to Code Section 11028 states
4 that, "The creditor and equity securities holders
5 committees -- " there's no equity and securities holders
6 here -- "will be the primary negotiating body for the
7 formulation of the plan of reorganization."

8 We're cognizant of your Honor's MDL order,
9 which basically gave lead counsel various rights and
04:37PM 10 privileges vis-a-vis settlement. We don't think we're
11 talking settlement in violation of that order, and what
12 we are doing, your Honor, is fulfilling our statutory
13 mandate in terms of talking with various interested
14 parties since we've been doing since day one of this
15 case, since January 18th, when we were formed about plan
16 process, plan protocol and moving this case to a
17 successful conclusion. Thank you.

18 THE COURT: All right. Without commenting
19 on the last point, I hope that the parties can work
04:37PM 20 together, and I hope that turf battles can be kept to a
21 minimum. Let's leave it at that.

22 Anything else I need to take up? We have, I
23 think, complaints that haven't been answered yet. I
24 would propose again to roll that over for the time
25 being, and I think there may be -- are there motions to

1 dismiss that are in the same category; is that right?
2 Ms. Parker.

3 MS. PARKER: Yes, your Honor.

4 THE COURT: Rolling over things from one
5 conference to the other to try to minimize work until we
6 have a master complaint and so forth in place.

7 MS. PARKER: Yes, your Honor. On Alaunus'
8 motion to dismiss, I have spoken with Mr. Ciporkin, who
9 can jump in, of course. As I understand it, they have
10 agreed to, I think his word was "forbear" the deadlines
11 on those indefinitely.

12 THE COURT: All right. Again, I do want to
13 take them, particularly the motion to dismiss, I don't
14 want to keep saying this, and I keep rolling it over,
15 but I don't want it to sit indefinitely, I do want to
16 bring that to a head, so I will do that.

17 Is there anything else other than setting
18 dates for the next conferences, is there anything else
19 that anybody wants to bring to my attention?

20 MR. MORIARTY: Yes, your Honor, I have two
21 things. I'm sorry to go back -- this is Matt Moriarty
22 for Ameridose -- I'm sorry to circle back to the
23 removal, New Jersey motions or the remand motions, but
24 one of the New Jersey lawyers on the phone mentioned
25 that severance is an option, so I want to address where

1 that really stands in the pecking order.

2 Under 1334 and Section 157, we are confident
3 that the array of defendants in the New Jersey cases
4 give you "related to" jurisdiction.

5 NECC is in a number of those cases, if not
6 all of them. Ameridose is in all of them. Alaunus is
7 in all or most of them, clearly "related to"
8 jurisdiction, and under the New Jersey Product Liability
9 Act, those state court defendants are clearly by
04:39PM 10 definition not manufacturers or sellers. That's why we
11 argued fraudulent joinder pretty vigorously at every
12 level.

13 And, quite frankly, our argument on 157 in
14 the New Jersey cases is very consistent with the
15 trustees' motion and even the view taken by the PSC on
16 these matters because the carve-out that they're urging
17 only pertain to cases like the Virginia cases, the
18 Tennessee cases where there are no Tier I, if you will,
19 defendants, so when we put in there that severance was
04:40PM 20 an option, it was clearly argued last and meant to be an
21 option of last resort.

22 Now, that segues into my second point. We
23 believe pretty strongly in the Section 157 argument for
24 many reasons and in many levels in what you've heard
25 today. There is certainly the possibility that you will

1 not agree with the trustee and the creditors' committee
2 and that those Virginia cases will stay in Roanoke for
3 ever more.

4 The only thing that I ask is that in many
5 MDLs where there is state litigation going on with
6 federal litigation where there may be any overlap
7 whatsoever in discovery is that you give us some lead
8 time to quickly put together a coordination order for
9 submission to you that talks about how potentially we
04:41PM 10 can reach out to state plaintiffs, state defendants,
11 possibly ways for you to reach out to state court judges
12 so that we can promote coordination to the greatest
13 degree and alleviate some of the concerns that have been
14 expressed here today.

15 THE COURT: Okay. If we get to that point,
16 I will certainly take that very seriously.

17 MR. MORIARTY: That's all, thank you.

18 THE COURT: Unless there's anything further,
19 I think what I'd like to do is to set a -- we might as
04:42PM 20 well set the next three or so. Peter, is it June 11th?

21 THE CLERK: June 11th at two.

22 THE COURT: June 11th at two. My schedule
23 is quite constricted going forward, and if some of you
24 can't make some of these dates with family vacation
25 plans and so forth, that's going to be hard for me to

1 move them. I certainly don't require the senior most
2 person to be here at all times, but I propose the next
3 status for June 11th at two. How about one in mid-July?

4 THE CLERK: July 18th at two.

5 THE COURT: July 18th at two, then
6 August before I disappear.

7 THE CLERK: August 20th at two.

8 THE COURT: August 9th at two, and to
9 recap --

04:43PM 10 MR. MORIARTY: I'm sorry, your Honor, to
11 interrupt, but on July 18th, it's the 10th anniversary
12 of our firm. There will probably not be any lawyers
13 available to come. We can send somebody or we can
14 appear by phone or we can try for the 17th, but --

15 THE COURT: I permit appearances by phone.

16 I can do July 19th at two, I can do July 17th at three.

17 MR. MORIARTY: If it has to be between the
18 18th and 19th, let's leave it at the 18th, and we'll do
19 the best we can.

04:44PM 20 THE COURT: All right. See if one junior
21 person can remain attentive and stay away from the punch
22 and the champagne and sit in on the meeting.

23 All right. With regard to the trustee's
24 motion to transfer and the related motions, motions for
25 mandatory abstention to withdraw the reference, to

1 remand and so on, those motions are all taken under
2 advisement. Parties wishing to file may do so by next
3 Monday, the 20th.

4 The trustee's motion seeking limited relief
5 as to the preservation order I will grant subject to
6 further discussion with the government. Hopefully
7 they'll be an agreed upon proposal. The plaintiffs'
8 steering committee's motion to partially lift discovery
9 will be granted, and we will again roll over until the
04:45PM 10 next status answers to complaints and responses to or
11 oppositions to Alaunus' motion to dismiss. Next
12 conference to be June 11th at 2:00.

13 All right. Is there anything else?

14 MR. FERN: Your Honor, just a point of
15 clarification.

16 THE COURT: Yes.

17 MR. FERN: I heard August 9th and I heard
18 August 20th.

19 THE COURT: I'm sorry, August 9th.

04:45PM 20 MR. SOBOL: I'm taking the alternate issue
21 seriously, your Honor, if there's something that myself
22 or Ms. Parker can't be here, we're just going to --

23 THE COURT: Yes. There is no way between my
24 schedule and all of your schedules that we can have
25 perfection where everyone is going to be available all

1 the time. I recognize you all have busy schedules, as I
2 do, and I'm sure we'll find a way to get through, and
3 that goes for any of you.

4 You know, I will accept the appearance of a
5 relatively junior person. I expect that person to be
6 reasonably well prepared, but I don't need to see the
7 senior most person with rare exceptions at any of these
8 conferences. All right. Thank you, all. Thank you for
9 your appearances and I will see you in about a month.

04:46PM 10 MS. PARKER: Thank you, your Honor.

11 (Whereupon, the hearing was adjourned at
12 4:46 p.m.)

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C E R T I F I C A T E

3 UNITED STATES DISTRICT COURT)
4 DISTRICT OF MASSACHUSETTS) ss.
5 CITY OF BOSTON)

I do hereby certify that the foregoing transcript, Pages 1 through 117 inclusive, was recorded by me stenographically at the time and place aforesaid in MDL NO. 13-02419-FDS, IN RE: NEW ENGLAND COMPOUNDING PHARMACY CASES LITIGATION and thereafter by me reduced to typewriting and is a true and accurate record of the proceedings.

14 Dated this May 17, 2013.

15 s/s Valerie A. O'Hara

VALERIE A. O'HARA

OFFICIAL COURT REC'D.

OFFICIAL COURT REC'D.